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Recent Decisions

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RECENT DECISIONS

CONTRACTS — MERGER CLAUSE NOT SUFFICIENTLY SPECIFIC AS TO TERMS ALLEGEDLY MISREPRESENTED BY SELLER TO PRECLUDE PURCHASER'S PROOF OF RELIANCE

S. Victor Wittenberg, the purchaser of a building in Bronx County, New York, sued to recover damages from the seller and the seller's broker and agent for fraudulent misrepresentations concerning specific, detailed operating expenses of the building. The contract of sale provided, among other things, that plaintiff had inspected the premises and agreed to take them "as is." It also provided, "that the seller has made no representations as to physical condition or services." This provision was followed by a conventional merger clause, with "neither party relying upon any statement or representation, not embodied in this contract, made by the other." The Supreme Court, Special Term, granted the motion of the seller and seller's broker and agent for judgment on the pleadings, and entered judgment thereon. On appeal, *held,* reversed. The disclaimer as to representations other than those in the contract was not specific enough to nullify the element of reliance on such representations necessary for fraud. *Wittenberg v. Robinov,* 9 App. Div.2d 290, 193 N.Y.S.2d 847 (1959).

The merger clause often found in sales contracts, is an expression by both parties that they are relying on no representations other than those present in the contract itself. When the parties involved consist of purchaser, principal, and agent, the merger clause serves to notify the purchaser of the agent's limited authority, thus protecting the principal from his agent's unauthorized acts.

When the parties involved consist solely of purchaser and principal, dealing face to face, the purpose of the merger clause is to define explicitly the terms of the contract, to make the contract the final statement of both parties, and to preclude either party from introducing evidence on matters other than those embodied in the contract.

As a result of the varying effect given these clauses by the courts, strong precedents have developed in diverse directions. A minority of courts hold that the clause prevents any action or defense based on representations or agreements not set out in the written contract.[1] The minority rationale is that contracts in writing, voluntarily entered into with full knowledge of their contents, should be enforced. Parties to a contract must be held to have read the papers signed by them.

> The cases holding the minority view state that the merger clause in the contract is notice of the limitation on the agent's authority; that the purchaser having notice of such limitation, has no right to rely on the statements of the agent; and one of the elements of fraud being reliance and having no right to rely, he is not misled and should not be permitted to seek rescission, nor damages on that ground.[2]

Where the parties deal face to face, the argument that only the written contract should be relied upon, and not oral representations or promises, is even more persuasive.

Other courts, holding that the clause is no more than a stipulation of the parol evidence rule, have treated the defenses solely in light of that rule.[3] The

1 Holland Furnace Co. v. Williams, 179 Kan. 321, 295 P.2d 672 (1956); A. E. Guth Piano Co. v. Adams, 114 Me. 390, 96 Atl. 722 (1916); J. B. Colt Co. v. Hinton, 143 Miss. 800, 109 So. 856 (1926); International Text-Book Co. v. Lewis, 130 Mo. App. 158, 108 S.W. 1118 (1908); Steiner Mfg. Co. v. Kochaniewicz, 3 N.J. Misc. 437, 128 Atl. 608 (1925); Danann Realty Corp. v. Harris, 5 N.Y.2d 317, 184 N.Y.S.2d 599 (1959). Annot., 133 A.L.R. 1349 (1941).

2 22 CORNELL L.Q. 102 (1936).

3 Johns-Manville Corp. v. Heckart, 129 Ore. 505, 277 Pac. 821 (1929). See also VOLD, SALES § 151 (2d ed. 1959); 9 WIGMORE, EVIDENCE § 2439 (3d ed. 1940); 3 WILLISTON, CONTRACTS § 811-A (rev. ed. 1936); Annot., 56 A.L.R. 13 (1928).

general rule is that in the absence of fraud, parol evidence cannot be received to contradict or vary terms of written contracts. When the agreement is reduced to writing, it must be considered as expressing the ultimate intention of the parties.[4]

There is an important exception to this general rule, however; parol testimony of misrepresentations inducing the execution of the contract is admissible. This is true even though the written contract contains guaranties or recitals to the effect that all agreements between the parties are contained therein, or a provision that no verbal agreement affecting its validity will be recognized.[5] In other words, a party to a written contract cannot avoid application of the rule that parol evidence is admissible to show that a written contract was entered into in reliance on fraudulent representations by inserting a clause in the contract that it shall be the sole evidence of the transaction.[6]

The majority of courts feel that to give full effect to the clause is too harsh, although they do afford it some consequence. For example, distinctions have been drawn between fraud as to the terms of the contract and fraud in the inducement, evidence being held inadmissible as to the former and admissible as to the latter.[7]

Another view holds that the clause relieves the principal of liability for deceit, but gives the buyer the option to rescind.[8] Indeed, an innocent principal might, by use of the merger clause, protect himself from liability in a tort action for damages for fraud and deceit; but the third party would be entitled to rescind the contract if he acted before a change of position by the principal.[9] This distinction is probably a sound one. The principal would normally be liable in tort for misrepresentations of an agent acting within the scope of his ostensible authority. However, by stipulating in the contract that the agent had no such authority, the principal has done all that is reasonably possible to give notice to a third party. Under such circumstances, the innocent principal should be relieved of liability for the agent's wrong. His personal liability may thereby be avoided, but the fraudulently procured contract remains subject to rescission.[10]

It is generally agreed that one who fraudulently obtains a written agreement may not obtain immunity for his fraud by including in such agreement a disclaimer of any representations respecting the matter alleged to constitute the fraud.[11] The New York cases have established the rule that fraud vitiates all contracts. Consequently, the merger clause has been held inapplicable. The position taken in *Angerosa v. White,* involving an agent's misrepresentations, is typical of the New York rule. The court said:

> In this jurisdiction, protection is given to one who is injured by a falsehood or deception; fraud vitiates everything which it touches, and destroys the very thing which it was devised to support; the law does not temporize with trickery or duplicity. A contract, the making of which was induced by

4 Johns-Manville Corp. v. Heckart, 129 Ore. 505, 277 Pac. 821 (1929).

5 Lufty v. R. D. Roper & Sons Motor Co., 57 Ariz. 495, 115 P.2d 161 (1941); Arnett v. Sanderson, 25 Ariz. 423, 218 Pac. 986 (1923).

6 Jones v. Brandt, 173 Wis. 539, 181 N.W. 813 (1921).

7 Rock Island Implement Co. v. Wally, 268 S.W. 904 (Mo. App. 1925); Plate v. Detroit Fidelity & Surety Co., 229 Mich. 482, 201 N.W. 457 (1924). *Cf.* Colonial Development Corp. v. Bragdon, 219 Mass. 170, 106 N.E. 633 (1914). Annot., 127 A.L.R. 132 (1940); Annot., 133 A.L.R. 1349 (1941).

8 Harnischfeger Sales Corp. v. Coats, 4 Cal.2d 319, 48 P.2d 662 (1935); Speck v. Wylie, 1 Cal.2d 625, 36 P.2d 618 (1934); Chapin v. Kreps, 106 N.J.L. 424, 147 Atl. 398 (1929); Kennedy v. McKay, 43 N.J.L. 288, 39 Am. Rep. 581 (1881); Super-Cold Southwest Co. v. Willis, 219 S.W.2d 144 (Tex. Civ. App. 1949). Annot., 95 A.L.R. 760 (1935). *But see* Hall v. Crow, 240 Iowa 81, 34 N.W.2d 195 (1948), allowing damages. Annot., 127 A.L.R. 143 (1940).

9 RESTATEMENT (SECOND), AGENCY §§ 259-60 (1958).

10 Harnischfeger Sales Corp. v. Coates, 4 Cal.2d 319, 48 P.2d 662 (1935).

11 Arnold v. National Aniline and Chemical Co., 20 F.2d 364 (2d Cir. 1927); Angerosa v. White Co., 248 App. Div. 425, 290 N.Y. Supp. 204 (App. Div. 1936), *aff'd,* 275 N.Y. 524, 11 N.E.2d 325 (1937); Jackson v. State of New York, 210 App. Div. 115, 205 N.Y. Supp. 658 (App. Div. 1924), *aff'd,* 241 N.Y. 563, 150 N.E. 556 (1925). See also Bridger v. Goldsmith, 143 N.Y. 424, 38 N.E. 458 (1894); 3 CORBIN, CONTRACTS § 578 (1951).

> deceitful methods or crafty device, is nothing more than a scrap of paper and it makes no difference whether the fraud goes to the factum, or whether it is preliminary to the execution of the agreement itself.
> . . . Fraud is considered so abhorrent and repugnant that the court will not permit itself to be made a party to enforcing any agreement upon which the hand of deception has been laid . . . .[12]

The present case was reversed by the Appellate Division in favor of the purchaser on the grounds that, unlike the language of the specific disclaimer in *Danann Realty Corp. v. Harris*,[13] it cannot be said that the plaintiff herein has clearly stipulated that it is not relying on any representations as to the very matter on which it now claims it was defrauded. Notably, no mention was made of fraud vitiating the contract. Rather, the court centered its attention on the specificity of the merger clause.

In the *Danann* case, the plaintiff alleged that it was induced to enter into a contract to sell a building lease held by the defendants because of oral representations, falsely made by the defendants, as to the operating expenses of the building and the profits to be derived from the investment. The plaintiff, affirming the contract, sought damages for fraud. The court held that where the contract contained an acknowledgement by the purchaser 1) that no representations had been made by the sellers as to physical condition, rents, leases, expenses, or operation, and 2) that the purchaser had inspected the premises, and 3) that neither party was relying upon any statement or representations not embodied in the contract, the purchaser had no right of action against sellers for alleged false representations. The basic problem presented was whether the plaintiff could possibly establish, from the facts alleged in the complaint, reliance upon the representations.[14] The court noted that if it were dealing solely with a general and vague merger clause, its task would be simple. A reiteration of the fundamental principle that a general merger clause is ineffective to exclude parol evidence to show fraud in inducing the contract would then be dispositive of the issue.[15]

The plaintiff in the principal case had, in the plainest language, announced and stipulated that it was not relying on any representations as to the very matter on which it claimed to be defrauded. Such a specific disclaimer destroys the allegations that the agreement was executed in reliance upon these contrary oral representations.[16] *Sabo v. Delman*[17] dealt only with the usual merger clause. The present case, however, as in *Cohen v. Cohen*,[18] includes an additional disclaimer as to specific representations. This specific disclaimer is one of the material distinctions between this case and *Angerosa* and *Sabo*, since the latter involved only general merger clauses.

In the *Cohen* case, the parties, husband and wife, had separated, and litigation affecting a division of property between them was pending when a settlement agreement was executed. This agreement contained a provision that neither had made any representations concerning the continuation of the marital status. Thereafter, the wife sued the husband, alleging that he had knowingly and falsely represented to her that he would be reconciled permanently, and that in reliance thereon she executed the settlement agreement. The Supreme Court granted defendant's motion to dismiss the complaint. On appeal, the Appellate Division, two justices dissenting, affirmed. Obviously, then, a specific disclaimer was held to preclude proof of reliance upon alleged misrepresentations in the absence of

12 248 App. Div. 425, 290 N.Y. Supp. 204, 213 (App. Div. 1936).
13 5 N.Y.2d 317, 184 N.Y.S.2d 599 (Ct. App. 1959).
14 Cohen v. Cohen, 1 App. Div.2d 586, 151 N.Y.S.2d 949 (App. Div. 1956), *aff'd*, 3 N.Y.2d 812, 144 N.E.2d 649, 166 N.Y.S.2d 10 (Ct. App. 1957).
15 Sabo v. Delman, 3 N.Y.2d 155, 143 N.E.2d 906, 164 N.Y.S.2d 714 (Ct. App. 1957).
16 Cohen v. Cohen, 1 App. Div.2d 586, 151 N.Y.S.2d 949 (App. Div. 1956), *aff'd*, 3 N.Y.2d 812, 144 N.E.2d 649, 166 N.Y.S.2d 10 (Ct. App. 1957).
17 3 N.Y.2d 155, 143 N.E.2d 906, 164 N.Y.S.2d 714 (Ct. App. 1957).
18 1 App. Div.2d 586, 151 N.Y.S.2d 949 (App. Div. 1956), *aff'd*, 3 N.Y.2d 812, 144 N.E. 2d 649, 166 N.Y.S.2d 10 (Ct. App. 1957).

duress or an allegation that the plaintiff failed to read or understand the disclaimer.

The court in *Wittenberg* stated that the issue was not whether the merger clause precluded proof of fraudulent misrepresentations, but rather whether the plaintiff could prove reliance on the misrepresentation. And, the court said, it is impossible to prove reliance without a showing that the merger clause was not understood. This position gives effect to the merger clause by implication.

Again, in the *Danann* case, the court said that the presence of such a disclaimer clause is inconsistent with the contention that plaintiff relied upon the misrepresentations and was led thereby to make the contract.

Since the court in *Wittenberg* based its decision on *Danann,* saying that the disclaimer was not specific enough, the inference is strong that the New York rule, that fraud vitiates the contract may be circumvented — *i.e.,* fraud will not vitiate the contract if the merger clause is so specific that it obviously precludes the purchaser from saying that he relied on any representations other than those in the contract. The *Cohen, Danann* and *Wittenberg* cases seem to bear this out. If the misrepresentation relied on is specifically covered in the merger clause, the courts will bar the purchaser from arguing that he relied on the misrepresentations covered by the specific disclaimers. While *Cohen, Danann,* and *Wittenburg* still deny the legal efficacy of general merger clauses in New York, they seem to permit specific disclaimers on the issue of reliance, reliance being an element for successful prosecution of fraud.[19]

Public policy demands that certainty in contractual relations give way to a more important consideration which permits a party to avoid promises obtained by deceit, and to negative attempts to circumvent that policy by contractual devices. It must be realized that parties often accept without critical examination contracts handed to them to be signed by disarming salesmen and supposed friends.[20] The ingenuity of contract draftsmen is certain to keep pace with the demands of wrongdoers. Therefore, parties dealing with them will be, in general, led into a false security by placing reliance on representations other than those in the contract, inconsistent with, if not violative of, the written agreement.[21]

19 Harnischfeger Sales Corp. v. Coats, 4 Cal.2d 319, 48 P.2d 662 (1935).

20 As a matter of principle it is necessary to weigh the advantages of certainty in contractual relations against the harm and injustice that result from fraud. In obedience to the demands of a larger public policy the law long ago abandoned the position that a contract must be held sacred regardless of the fraud of one of the parties in procuring it. No one advocates a return to outworn conceptions. The same public policy that in general sanctions the avoidance of a promise obtained by deceit strikes down all attempts to circumvent that policy by means of contractual devices. *In the realm of fact it is entirely possible for a party knowingly to agree that no representations have been made to him, while at the same time believing and relying upon representations which in fact have been made and in fact are false but for which he would not have made the agreement.* To deny this possibility is to ignore the frequent instances in everyday experience where parties accept, often without critical examination, and act upon agreements containing somewhere within their four corners exculpatory clauses in one form or another, but where they do so, nevertheless, in reliance upon the honesty of supposed friends, the plausible and disarming statements of salesmen, or the customary course of business. To refuse relief would result in opening the door to a multitude of frauds and in thwarting the general policy of the law. Bates v. Southgate, 20 Mass. 170, 31 N.E.2d 551, 558 (1941). (Emphasis added.)

21 It is worth remembering that the ingenuity of the draftsmen is sure to keep pace with the demands of wrongdoers, and if a deliberate fraud may be shielded by a clause in a contract that the writing contains every representation made by way of inducement or that utterances shown to be untrue were not inducements to the agreement, sellers of bogus securities may defraud the public with impunity, through the simple expedient of placing such a clause in the prospectus which they put out, or in contracts which their dupes are asked to sign. Arnold v. National Aniline & Chemical Co., 20 F.2d 364 (2d Cir. 1923) (dissent).

Circumventing the vitiation of the entire contract through specific merger clauses will not serve as a panacea in the area of difficulty here encountered. What is needed is a solution which will eliminate entirely the facility with which fraud is foisted upon disarmed or unobservant parties. The introduction of printed offers which include blanks for the purpose of filling in by handwriting the more pertinent points would present such a solution. The offer to purchase would appear in its usual form, except for blanks to be filled in by the agent or principal in the presence of the purchaser as to the more important elements of the contract. The merger clause would then have greater opportunity of being a fundamentally sound method of precluding parol evidence. It would be assured of legal effectiveness.

Robert W. Cox

DISCRIMINATION — HOUSING — CONTROLLED OCCUPANCY PATTERN IS ILLEGAL PER SE — PARTY ADOPTING CONTROLLED OCCUPANCY PATTERN CANNOT ENJOIN INTERFERENCE WITH THE PATTERN DUE TO EQUITABLE "UNCLEAN HANDS" DOCTRINE — Progress Development Corporation is engaged in the business of building racially integrated private housing developments through the use of a "controlled occupancy pattern."[1] In September 1959, it purchased twenty-two acres in two subdivisions of the Village of Deerfield, an all white community in Illinois, and started building. On November 11, 1959, the Village of Deerfield and its residents learned that Progress was going to sell ten to twelve homes to Negroes. The Village of Deerfield through its Park Board, on December 7, 1959, adopted a resolution ordering that Progress' land be acquired by condemnation proceedings for park purposes. Progress brought suit in the federal district court to enjoin the Village of Deerfield and its Park Board from condemning the land. *Held:* Injunction denied. The Park Board acted in good faith and within its power when it instituted condemnation proceedings. The "controlled occupancy pattern" which the plaintiff proposed was unconstitutional and illegal. Therefore the plaintiff did not come into a court of equity with clean hands. *Progress Development Corp. v. Mitchell,* 182 F. Supp. 681 (N.D. Ill. E.D. 1960).

The crucial issue in this lengthy opinion was the possible application of the doctrine of *Shelley v. Kraemer*[2] to a situation in which state action could only be found at the outermost periphery of the legal action. Collaterally, the court proposed what appears to be a new dimension in the "clean hands" doctrine.

No principle is better settled than the maxim that "he who comes into equity must come with clean hands" or be denied all relief regardless of the merits of his claim.[3] This doctrine was first enunciated in *Dering v. Earl of Winchelsea* by Lord Chief Baron Eyre, who stated:

> . . . that a man must come into a court of Equity with clean hands, but when this is said, it does not mean a general depravity, it must have an immediate and necessary relation to the equity sued for, it must be a depravity in a legal as well as in a moral sense.[4]

1 "Controlled occupancy pattern" is another name for a quota system of housing which reflects racial occupancy proportionate to the racial ratio in the immediate vicinity. Mr. Morris Milgram, head of Modern Community Developers Inc, which controls Progress, stated that he had found it advisable to adopt a quota on the proportion of Negroes in his project in order to assure an adequate level of white occupants. By contractual agreements through which the developer has first option on homes for sales this quota is maintained and the residents are secure in the knowledge that the project will not become predominantly Negro. STAFF OF SENATE COMM. ON CIVIL RIGHTS, 85th CONG., 2D SESS., REPORT ON CIVIL RIGHTS at 512 (Comm. Print. 1959).

2 334 U.S. 1 (1948). Under the Fourteenth Amendment states may not enforce restrictive covenants based on racial discrimination.

3 Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. 806 (1945); Root Refining Co. v. Universal Oil Prod. Co., 169 F.2d 514 (3d Cir. 1948); O'Brien v. O'Brien, 197 Cal. 577, 241 Pac. 861 (1925).

4 1 Cox. Eq. 319, 29 Eng. Rep. 1184, 1185 (1787).

This maxim is generally applied only where the "unclean hands" directly affected the basic course of action between the parties or is so connected with the subject matter in litigation that it in some measure affects the equitable relation subsisting between the parties.[5] Thus the plaintiff's fault must inhere solely in his claim in order to deny him equitable relief. Tangential depravity is immaterial to the "clean hands" doctrine.

It is also a fundamental principle of law that only those actions of individuals which are in no respect sanctioned, supported, or participated in by any agency of the government are beyond the scope of the Fifth and Fourteenth Amendments.[6] Racial discriminations which are merely "the wrongful acts of the individuals" can remain outside of the guarantee of the Constitution only so long as they are "unsupported by the state authority in the shape of laws, customs, or judicial or executive proceedings."[7]

The Supreme Court has used this concept of state action to protect the personal rights of minority groups. In *Buchanan v. Warley*[8] the court would not enforce a municipal ordinance restricting occupancy in designated areas to persons of specified race and color, because this would be a denial of the rights of white sellers and Negro purchasers of property guaranteed by the due process clause of the fourteenth amendment. In *Shelly* the Supreme Court expanded this concept on the theory that judicial enforcement of racially restrictive convenants would be state action in violation of the equal protection clause. It did not declare that these convenants were illegal per se, but stated:

> We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as a violation of any right guaranteed to petitioner by the fourteenth amendment. So long as those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated.[9]

In *Barrows v. Jackson*[10] the Supreme Court further extended the concept when it ruled that state courts cannot award damages for a breach of a racial restrictive convenant because this would indirectly enforce it by state action.

A number of state and lower federal courts have applied the doctrine of state action to cases of discriminatory conduct by private persons who control property, the construction or maintenance of which has been aided by the state.[11] In *Banks v. California Housing Authority*[12] the Housing Authority was leasing housing units on a "neighborhood pattern policy" based on a survey of the racial composition of the neighborhood where the project was located. The purpose of this policy was to maintain and preserve the same racial composition which existed before the project was initiated. The Housing Authority found that the proportionate needs of racial groups for housing were 70 per cent white and 30 per cent non-white. The California court declared that this quota system was racial discrimination and unconstitutional because it was carried out by the state and the rights guaranteed by the fourteenth amendment are personal rights, not group rights. A New Jersey court also declared a quota system of housing unconstitutional when used by the public housing authorities.[13]

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5 Toomer v. Witsell, 334 U.S. 385 (1948); Keystone Driller Co. v. General Excavator Co., 290 U.S. 240 (1933).

6 Civil Rights Cases, 109 U.S. 3 (1883).

7 *Id.*, at 17.

8 245 U.S. 60 (1926).

9 Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

10 346 U.S. 249 (1953).

11 Note, *Racial Discrimination In Housing,* 107 U. PA. L. REV. 519 (1955); Note, 33 NOTRE DAME LAW. 463 (1958).

12 120 Cal. App. 2d 1, 260 P.2d 668 (1953), *cert. denied,* 347 U.S. 974 (1954); *accord,* Detroit Housing Authority v. Lewis 226 F.2d 180 (6th Cir. 1955); *contra,* Favors v. Leonard, 40 F. Supp. 743 (E.D. Pa. 1941).

13 Taylor v. Leonard, 30 N.J. Supp. 116, 103 A.2d 632 (1954).

The Supreme Court has never directly passed on the constitutionality of a quota system, but it has upheld the rights of a state court to enjoin Negroes picketing a grocery store in order to secure proportional hiring of Negro clerks in relation to the number of Negro customers.[14] However, the courts have upheld the right of a private corporation to refuse the admission of Negroes to low-rental housing projects constructed and owned by private corporations.[15]

Quota systems by their nature are discriminatory. In holding the quota systems unconstitutional, it was essential for the courts to find state action in their enforcement.

The court in the present case stated that Progress' "controlled occupancy pattern" was, in reality, a quota system of housing based on racial discrimination, and therefore it was illegal and unconstitutional under the equal protection clause of the Fourteenth Amendment. By unrecorded resale agreements in which Progress had first option on houses for resale, the court found that Progress was going to maintain a quota of 20 per cent Negroes in its subdivisions. Citing *Shelley v. Kraemer,* the court declared that it would be lawful for Progress to require convenants running with the land and to require that the grantee would never convey the premises to any person not a member of a particular group, but that no court could constitutionally enforce discriminatory restrictions. It then maintained that if Progress' quota of 20 per cent was constitutional, then a quota of 99 per cent would be constitutional and *Shelly v. Kraemer* would be circumvented.

After declaring that Progress' "controlled occupancy pattern" was illegal the court went on to say that Progress was in a court of equity with unclean hands. It stated that:

> A party who plans to put into effect a system of land tenure whereby ownership or occupation of land will be controlled on racial or other discriminatory bases cannot seek damages in a federal court for any interference which prevents such party from putting such plan into effect.[16]

The court's concept of the state action proscribed by *Shelley* would appear to be that once a party is found to be connected with action which is illegal and unconstitutional he is permeated with the depravity and has no standing in court to enjoin even tortious conduct against himself which is directed toward thwarting the illegal and unconstitutional action.

The *Progress* court holds controlled occupancy patterns illegal *per se* even though they are devised solely by private parties to control other private parties without aid from state power. This is done in the face of precisely contrary language in the *Civil Rights Cases*[17] and *Shelley v. Kraemer.* In the patterns themselves, there is no hint of the state action which was fatal in Shelley. The Shelley Court even went so far as to disclaim, in language quoted above, the unconstitutionality in the restrictive covenants present in the case.

The present court makes the point that the patterns are discriminatory, which is not denied. It does not bother, however, to explain *why* they are illegal. There is no citation to state or federal statutes or constitutions, save the Fifth and Fourteenth amendments which were rendered inapplicable by Shelley. One is hard-pressed to conceive of any other illegality inhering in the patterns.

In attempting to find state action, the *Progress* court stretches the principles of *Shelley* to limits obviously not conceived by the Supreme Court. The district court was not asked to enforce any discriminatory covenants but merely to test the validity of a municipal condemnation order. The court takes great pains to show that Progress' land was the only land left available for a park and that the Park

14 Hughes v. Superior Ct. of California, 339 U.S. 460 (1950).

15 Hackley v. Art Builders Inc., 179 F. Supp. 851 (E.D. Md. 1960); Dorsey v. Stuyvesant Town Corp., 279 N.Y. 512, 87 N.E.2d 54 (1948), *cert. denied,* 339 U.S. 981 (1950).

16 Progress Development Corp. v. Mitchell, Civil No. 59 C 2050, D. Ill. March 4, 1960 at 72.

17 109 U.S. 3 (1883).

Board had been considering a park for some time. The decision in *Progress* was clearly justified without the ambitious undertaking of extending the *Shelley* doctrine. If the District Court had found the condemnation unwarranted, it still would not have condoned or aided the occupancy patterns.

By the holding in *Progress,* the court seemingly lays the Progress Development Corp. open to all sorts of harrassment, normally enjoinable, solely because they are endeavoring to forcibly integrate a white community through legitimate commercial means. A generalization of such a rule would lead to the untenable conclusion that an unpopular man does not have the protection of the law. This is an unvarnished doctrine of self-help among the citizenry; clearly inimical to the rule of law.

Even more difficult to understand is the court's conclusion that Progress comes into equity court with unclean hands. The tests used by the courts to determine whether this doctrine should be used are: 1) Does the illegality complained of affect the basic cause of action between the parties? or 2) Does the illegality affect the equitable relationship between the parties?[18] If Progress' quota system is illegal, it affects only the rights of white and colored buyers of Progress' property, who were not parties to the suit. The legality or illegality of Progress' quota system does not affect the equitable relationship between it and Deerfield, because Progress was not discriminating against Deerfield.

There is also sound policy reasons why Progress' "controlled occupancy pattern" should be allowed to operate in Deerfield without capricious interference from the courts. It is the public policy of the United States that every American should have an equal opportunity to secure a decent home in a good neighborhood.[19] But these opportunities for minority groups are seriously lacking or non-existent in Chicago, and especially in outlying suburbs such as Deerfield.[20] Also, the United States is carrying out a policy of integration in its Public Housing plan.[21] There is ample evidence to prove that Negroes and white residents can live side by side in harmony and friendship, where there is some stability in the proportion of Negroes and whites, and where there is a confidence that this proporation, roughly mirroring the general community, will continue.[22] Progress by its "controlled occupancy pattern" is trying to promote integration, and at the same time provide decent homes for Negroes.

The present court had various valid reasons for denying Progress their petitions for injunctions. There was neither necessity nor substantiation for the sojourn into the restrictive covenants field. The court allowed the Town of Deerfield Park to deter an attempt at integrated housing, but there is little need for allowing the case to survive for anything more than a municipality's right to condemn land. There are strong reasons for avoidance of the extension of the *Shelley* doctrine and the denial of equitable relief due to "unclean hands."

Peter O. Kelly

EXTRADITION — POLITICAL OFFENSES EXCLUDED IN EXTRADITION TREATY WITH CUBA — AFFILIATION OF FUGITIVE WITH REVOLUTIONARY MOVEMENT SUCCEEDING TO POWER AS DEMANDING GOVERNMENT NOT DECISIVE IN OVERCOMING EVIDENCE TENDING TO SHOW OFFENSE CHARGED WAS POLITICAL. — Two members of Fidel Castro's revolutionary army in Cuba were court-martialed and sentenced to prison terms when convicted of murdering a Batista sympathizer who had been placed in their custody. They escaped to the United States where the vice-consul

18 Cases cited notes 3-5 *supra.*
19 REPORT ON CIVIL RIGHTS, *op. cit. supra* note 1 at 534.
20 *Id.,* at 429.
21 *Id.,* at 534.
22 See Cohen, *The Case for Benign Quotas in Housing,* Phylon, Spring, 1960.

of the Republic of Cuba filed a complaint requesting their extradition. In a hearing before the U.S. District Court in Miami, the demanding government submitted as its only evidence a transcript of the court-martial proceedings. Defendants introduced testimony that the killing resulted from their attempt to prevent the prisoner's escape; that to allow the escape would have meant forfeiting their own lives; and that the homicide was incident to the political uprising and not motivated by personal animosity. Defendants also alleged that the victim was a prominent Communist, and that the trial and conviction was engineered by the Communists through the strong influence they had in the Castro regime. *Held,* the crimes charged were political offenses and defendants were not subject to extradition. *Ramos v. Diaz,* 179 F. Supp. 459 (S.D. Fla. 1959).

Extradition is "the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender."[1] No branch of the government is empowered to extradite a person upon the request of a demanding government unless such action is authorized by treaty or statute.[2] For an offense to be extraditable it must be made criminal by laws of both the United States and the demanding government.[3] To invoke the provisions of an extradition agreement, a foreign government through its authorized representative may file a complaint before the proper court or commissioner. A warrant will issue for the apprehension of the person charged and for his appearance before a hearing to determine if the evidence meets the requirements of the extradition treaty or convention.[4] Documentary evidence properly authenticated by the demanding government is admissible.[5] If the evidence is sufficient, the record of proceedings is certified to the Secretary of State, and the person charged is committed to jail pending his surrender to the demanding government.

The United States and Cuba are mutually bound by treaty to the surrender and extradition of fugitives charged with certain specified crimes, including murder.[6] However, article 6 of the basic treaty excludes from the category of extraditable fugitives any person charged with an offense "of a political character, or if it is proved that the requisition for his surrender has, in fact, been made with a view to try or punish him for an offense of a political character."[7]

Similar provisions to exclude political offenders appear in most of the extradition treaties into which the United States has entered, and where not specifically excluded, the treaties are interpreted as having this intention.[8] Many other western countries follow a similar policy, one which apparently grew out of the political upheavals of the last century.[9] Since the liberal, representative systems of government which they may now enjoy were in many cases achieved by extreme political agitation and even revolution, these countries have reason to be sympathetic to the efforts of reformers and revolutionaries in other lands, even though they do not tolerate violent forms of political activity at home. It is also considered offensive for an asylum country to be bound to return unsuccessful political offenders to their homelands and the vengeance which would await them there.[10]

1 Terlinden v. Ames, 184 U.S. 270, 289 (1902).
2 Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5, 9 (1936).
3 Wright v. Henkel, 190 U.S. 40, 58 (1903).
4 18 U.S.C. § 3184 (1958).
5 18 U.S.C. § 3190 (1958).
6 Treaty With Cuba on Extradition, Apr. 6, 1904, art. II, para. 1, 33 Stat. 2265, as amended, 33 Stat. 2273; Additional Treaty With Cuba on Extradition, Jan. 14, 1926, 44 Stat. 2392.
7 Treaty With Cuba on Extradition, Apr. 6, 1904, art VI, 33 Stat. 2265.
8 2 HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1020 (2d ed. 1945).
9 García-Mora, *The Present Status of Political Offenses in the Law of Extradition and Asylum,* 14 U. PITT. L. REV. 371, 373 (1953).
10 2 HYDE, *op. cit. supra* note 7, at 1019.

Granting the need for such a policy, those countries adopting it have encountered difficulty in applying it to the wide variety of situations arising in an age of political unrest. The courts of the United States in extradition hearings have long had to deal with the problem of determining whether or not a particular offense should be considered political under the attendant circumstances. Examples of offenses which have been considered are the making of treasonous radio broadcasts,[11] bank robbery,[12] arson and kidnapping,[13] and even wholesale murder.[14] Unfortunately, when ideologies come into conflict the most shocking and seemingly inexcusable offenses often are committed by men who may be acting under altruistic motives.

During times of political unrest criminal acts may have an ambivalent character. They may be committed in order to further a political end and at the same time be undertaken to satisfy some non-political, selfish end. It is asking much of the asylum country to apply an elaborate test to the kind of evidence with which it must contend. If the motive of the offender is made the principal subject of inquiry,[15] the extradition magistrate is confronted with the task of speculation as to what may have been the fugitive's thought processes at the time the offense was committed, months or years previously, in a foreign land. Adequate evidence to support a conclusion based upon motive alone is seldom available.

The court in the instant case applied the test formulated in *In re Castioni*.[16] Although not universally applicable to every offense which may have been politically inspired, it has the advantages of simplicity, uniformity, and a tolerant regard for the fugitive in his plight. The test recognizes that "there are many acts of a political character done without reason, done against all reason; but at the same time one cannot look too hardly, and weigh in golden scales the acts of men hot in their political excitement."[17] The English court thereupon adopted the broad rule that crimes are to be considered political offenses and not extraditable if they are "incidental to and formed a part of political disturbances."[18] Three years later a U.S. district court applied the *Castioni* test in an extradition hearing concerning five members of an overthrown Central American government who were seeking asylum,[19] and it has since become the standard adopted by the courts of this country.[20]

The evidence was ample to establish that a political uprising had been in progress, and that the slaying of a political prisoner was an incident thereto. Testimony offered by defendants that malice played no part in the homicide was not rebutted. The liberal requirements of *Castioni* were therefore met. The Cuban government, however, argued that such a test was not applicable when the fugitives were members of the same movement which now sought their extradition. The reasoning behind this contention would seem to be that since the purpose of excluding political offenders from extradition is to prevent their being punished for political beliefs and activities, this safeguard does not apply when the movement to which defendants owed allegiance seeks their return, because the demanding government could not then be motivated by a desire for political retaliation. The court held, however, that the motive of the Cuban government in demanding the

11 Chandler v. United States, 171 F.2d 921 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949).
12 *In re* Ezeta, 62 Fed. 972 (N.D. Cal. 1894).
13 Ornelas v. Ruiz, 161 U.S. 502 (1896).
14 Karadzole v. Artukovic, 247 F.2d 198 (9th Cir. 1957).
15 For an analysis of political offenses from the standpoint of motive, see the opinion of the Supreme Court of Justice of Chile in a 1957 extradition proceedings noted in 54 AM. J. INT'L L. 693, 694 (1959).
16 1 Q.B. 149 (1891).
17 *Id.* at 167.
18 *Id.* at 166.
19 *In re* Ezeta, 62 Fed. 972 (N.D. Cal. 1894).
20 See 35 C.J.S. *Extradition* § 26 (1943).

extradition was not controlling. "The status of the offense committed, whether it is a political crime or not is to be determined by the circumstances attending the crime at the time of its commission and not by the motives of those who subsequently handle the prosecution."[21]

This would appear to be a correct application of the *Castioni* doctrine. Whatever category the Cuban revolution occupies, history gives many examples of revolutionary movements which, having succeeded to power, turn upon their own members once the late enemy has been destroyed. Since such movements may elicit the support of widely divergent groups in a society, it would be asking much of the extradition magistrate to distinguish the loyal partisan from the lately discovered "counter-revolutionary." The instability which has plagued the political life of many Latin American countries is exemplified by the rise and early demise of a succession of governments established by revolution or *coup d'état.*[22] In such a political climate, survival can depend upon a fine sense of timing in switching allegiances as the pendulum swings. Elements of the old government often reappear in the vanguard of the new regime. Given the requirements of the *Castioni* test, the court must concentrate upon the "circumstances attending the crime at the time of its commission." Subsequent political developments and the composition of the demanding government, both of which are beyond the defendant's control, cannot be decisive. It also seems undesirable that the court, without necessity, undertake to rule upon the motives and good faith of a demanding government with which this country was striving to maintain and improve relations.[23]

The test of *Castioni* has again demonstrated its value by permitting the court to focus its attention upon the fugitive and the environment in which his offense was committed. If the crime was incident to political disturbance, the defendant's status as a political offender remains independent of the success or failure of his cause. The extradition magistrate needs the flexibility and compassion of such a test because the defendant's fate rests largely in his hands. There is no appeal at law from the results of an extradition hearing, [24] although the Secretary of State does retain ultimate, discretionary power of review.[25]

Louis N. Roberts

SUNDAY LAWS — INTERPRETATION AND CONSTRUCTION — MUNICIPAL ORDINANCES FORBIDDING ALL BUSINESS ON SUNDAY EXCEPT EMERGENCY BUSINESSES IS INVALID AS UNRELATED TO POLICE POWER TO PROTECT FREEDOM TO WORSHIP. — Pacesetter Homes, a corporation engaged in constructing and selling houses, sought a declaratory judgment against the Village of South Holland, asking that a municipal ordinance be declared unconstitutional. The challenged ordinance was directed against all Sunday business activity, except that necessary to satisfy emergency needs. The circuit court upheld the validity of the ordinance. On appeal to the Supreme Court of Illinois, *held,* reversed and remanded. The closing ordinance was invalid since it made no attempt to classify activities according to their relationship to the legitimate object of the police power — deterring disturbance of the right to worship. *Pacesetter Homes, Inc. v. Village of South Holland,* 18 Ill.2d 247, 163, N.E.2d 464 (1960).

21 Ramos v. Diaz, 179 F. Supp. 459, 463 (S.D. Fla. 1959).

22 *In re* Ezeta, 62 Fed. 972 (N.D. Cal. 1894), gives an account of this turmoil in one country.

23 However, the English courts have recognized that judicial notice ought properly to be taken of political conditions prevailing in the demanding country when a narrow interpretation of the *Castioni* test would work injustice. Regina v. Governor of Brixton Prison, [1955] 1 Q.B. 540.

24 Laubenheimer v. Factor, 61 F.2d 626, 628 (7th Cir. 1932).

25 4 HACKWORTH, DIGEST OF INTERNATIONAL LAW 46 (1942).

Municipalities usually have the power to make and enforce police regulations,[1] provided the exercise of the power does not conflict with state statutes or state policy.[2] Any person who challenges the validity of such an ordinance is faced with a presumption of the regulation's validity, which can be defeated only by showing that the ordinance is unreasonable on its face.[3] Normally, an attempt to invalidate a Sunday law is based on a showing of arbitrariness in classification or exception.[4] The classification of activities as within or without the purview of local legislation must be substantiated by proof of reasonable relation to the objectives of the police power.[5]

Pacesetter poses squarely a question as to the purpose of Sunday legislation. Historically, Sunday laws were based on government protection provided for the church.[6] The modern interpretation of the traditional American concept of separation of Church and State is that the church-state union has been eradicated. Iowa, for instance, has repealed its Sunday law.[7] California prohibits only boxing;[8] Arizona does not allow barbering.[9] The most common rationale in support of presently existing "blue laws" is that they promote community health and welfare. By prohibiting various forms of activity one day a week many states have theorized that they are providing a "day of rest";[10] the labor force is given an opportunity to relax from a week of toil. Sunday is assigned as this day of rest on the basis of custom and not religion.[11] Other states have made a weekly day of rest compulsory by "one day in seven" laws.[12] By this method the employer and employee are allowed to select the day off without any interference by the state.

In addition to a "one day in seven" law, Illinois prohibits labor and amuse-

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1 ILL. REV. STAT. ch. 24, § 23-105 (Smith-Hurd 1957).

2 Arrigo v. City of Lincoln, 154 Neb. 527, 48 N.W.2d 643 (1951); *Ex parte* Johnson, 77 Okla. Crim. 360, 141 P.2d 599 (1943).

3 It is primarily the province of the municipal body . . . to determine the use and purpose to which property may be devoted; and it is neither the province nor the duty of the courts to interfere with the discretion with which such bodies are vested, unless the legislative action of the municipality is shown to be arbitrary, capricious, or unrelated to public health, safety and morals. Wechter v. Board of Appeals, 3 Ill.2d 13, 119 N.E.2d 747, 748 (1954).

4 In Broadbent v. Gibson, 105 Utah 53, 140 P.2d 939 (1943), a statute prohibiting certain types of Sunday ice cream selling was held invalid because of discriminatory classification; *cf.* Cowan v. City of Buffalo, 157 Misc. 71, 282 N.Y. Supp. 880 (Sup. Ct. 1935), where ordinance prohibiting open air markets on Sunday was held discriminatory.

5 City of Springfield v. Hurst, 57 N.E.2d 425 (Clark County Ct. App. 1943); Village of Western Springs v. Bernhagen, 326 Ill. 100, 156 N.E. 753 (1927).

6 PFEFFER, CHURCH, STATE AND FREEDOM 229 (1953):

Two conclusions are clear from this summary of the historical background of American Sunday laws. First: Sunday laws have always been the product of church-state unions; and second, they have always been religious laws. In the days before the constitutional requirement of strict separation of church and state became binding on the states as on the Federal government, and when the states were more religiously homogeneous than they are today, the courts quite frankly recognized the religious nature of Sunday laws.

7 Iowa Acts 1955 (56 G.A.) ch. 27, § 1, repealing IOWA CODE ANN. § 729.1 (1950).

8 CAL. PEN. CODE § 413½.

9 ARIZ. REV. STAT. ANN. § 32-357 (1956).

10 *E.g.*, MO. ANN STAT. § 563.690, § 563.720 (1953); OHIO REV. CODE ANN. § 3773.24 (Page 1959); See cases cited note 11 *infra*.

11 In State v. Chicago B. & Q. R. Co., 239 Mo. 196, 143 S.W. 785 (1912), a Missouri statute was construed to provide for a day of rest on the basis of a civil policy for the general good of mankind. State v. Powell, 58 Ohio St. 294, 50 N.E. 900 (1898): "The prohibition of secular business on Sunday is advocated on the grounds that by it the general welfare is advanced, labor protected, and the moral and physical well-being of society promoted."

12 *E.g.*, ILL. REV. STAT. ch. 48, § 8a-h (Smith-Hurd 1957); WIS. STAT. ANN. § 103.85 (1957).

ments on Sunday.[13] A redefinition of the purpose of this state statute was the basis of the *Pacesetter* holding. The statute was, in an early case,[14] held to embrace only those activities interfering with worship. In that opinion any relation to the promotion of religion or to the prohibition of business transactions was expressly denied, and the sole purpose of the law was held to be the protection of those who wished to worship. Nine years later, a local ordinance prohibiting the vending of wares was upheld.[15] This holding rested on a broader concept of police power, *i.e.*, public health and welfare, and not merely the disturbance of worship. Later decisions indicated that classifications of activities as within the police power must bear a reasonable relation to the objectives of that power. These cases also set the broad limits to the police power. The court required a discernible or specific connection between the forbidden activity and the nebulous goal of public health and welfare.

In *Eden v. People*,[16] the Illinois court condemned specific prohibitions as violative of due process, but suggested that it would uphold a general prohibition. Yet, in *Pacesetter*, the court decided against the validity of an ordinance which was both general and all-inclusive in its terms. The arbitrariness is said to rest in the failure of the legislature to classify the specific activities which the ordinance prohibits. The court substantiates its position by a narrow interpretation of the objectives of police power established in the Illinois Sunday statute. Specific allusion to general public health and welfare is avoided, and the earlier interpretation of prohibiting only such Sunday labor as would disturb those desiring to worship is reinstated.[17] It is understandable, therefore, that the court fails to find any connection between the exhibition of a model house and disturbance of worship. Normally, the valid portions of municipal legislation may be enforced after the invalid portions have been declared unconstitutional.[18] This is not so in the *Pacesetter* case, for the entire ordinance was declared invalid, the court holding that general legislation cannot be valid as to one kind of activity within its terms and invalid as applied to another kind equally within its terms. The court states that any attempt on its part to choose between valid and invalid applications of a sweeping statute would be usurping the legislature's function.

The state has a duty to prevent interference with the worship of its inhabitants.[19] It fulfills this duty by protecting peaceful church attendance on the customary day of worship. In enacting laws for this purpose the state acts for the good of society by at least indirectly improving and strengthening the moral fiber of the community. The state cannot compel worship, however, since such laws would not only be unenforceable, but totally impractical. The state can protect a man's freedom to worship, but it can hardly insist that he exercise it.

The *Pacesetter* court succeeds in striking a balance between a Sunday law and freedom, thereby recognizing the purpose of the law and the means necessary

13 ILL. REV. STAT. ch. 38, § 549 (Smith-Hurd 1957):
> Whoever disturbs the peace and good order of society by labor (works of necessity and charity excepted), or by any amusement or diversion on Sunday, shall be fined not exceeding $25. This section shall not be construed to prevent motormen and railroad companies from landing their passengers or motormen from loading and unloading their cargoes, or ferrymen from carrying over the waters travelers and persons moving their families, on the first day of the week, nor to prevent the due exercise of rights of conscience by whomever thinks proper to keep any other day as a Sabbath.

14 Richmond v. Moore, 107 Ill. 429 (1883).

15 McPherson v. Village of Chebanse, 114 Ill. 46, 28 N.E. 454 (1885).

16 161 Ill. 296, 43 N.E. 1108 (1896); see also City of Mt. Vernon v. Julian, 369 Ill. 477, 27 N.E.2d 52 (1938).

17 See Richmond v. Moore, 107 Ill. 429 (1883).

18 McQUILLAN, MUNICIPAL CORPORATIONS, § 20.64 (1949): "If the different portions of an ordinance are independent of each other, the invalid portion thereof may be eliminated and the valid sections may be retained and enforced."

19 Cantwell v. Connecticut, 310 U.S. 296 (1940).

to accomplish its objectives. Yet the opinion honestly admits that religion remains at the root of Sunday restrictions: "Since the only legitimate purpose of Sunday laws is to enable others to worship free from disturbance, it follows that activities otherwise lawful can be prohibited only if they reasonably tend to disturb others."[20] In Illinois, relaxation from toil in the interests of public health and welfare is provided for by the "one day in seven" law. An interpretation of the Sunday law as a general health and welfare provision would render it superfluous.

The objectives of Sunday legislation should be well defined in order that methods to attain its goals may be adopted. It is a platitude to label general public health and welfare as the aim of a Sunday ordinance.[21] It is more desirable that the legislator rely upon a concrete and attainable criterion, such as avoiding disturbance of worship. Even though public health and welfare is a possible basis for "blue laws," the *Pacesetter* court holds that municipal regulations should have no broader aim than the prohibition of activity which would obviously interfere with worship. In the words of the court, "The object in this case is the maintenance of quiet and order, and the evil to be remedied is the disturbance of others in their religious worship."

A combination of compulsory "one day in seven" legislation plus a Sunday law, enacted under the police power as interpreted in this case, provides a fair solution for the "blue law" dilemma. Discrimination against those who worship on a day other than Sunday, those who find another day more convenient for relaxation, and those who wish to operate some harmless business enterprise would virtually be ended. The state in a pluralistic democracy should not adopt so paternal an attitude as to appoint Sunday as the sole day of rest and relaxation. The protection of freedom of worship must apparently come about with a minimum restraint on economic and recreational activity.

A decrease in lobbying battles over legislative classification of forms and types of business and labor would also result. Avoiding the disturbance of worship provides a much smaller basis of classification than does public health and welfare. Many businesses which possibly could be restricted under the public health and welfare classification could never be found to have a reasonable relation to protecting worship from disturbance.

A law prohibiting all Sunday business has no logical foundation. It is an axiom in American society that business should not be unnecessarily regulated. A Sunday law which deprives the populace of the convenience of accessible stores, and proprietors of the opportunity to seek gain, is unnecessary when the purpose of the law is limited to the avoidance of disturbing religious worship.

In the future, a stricter judicial surveillance would be helpful in establishing classifications suitable to satisfy a narrowed view of the purposes of this branch of the law. It may well be that the usual presumption of legislative validity should be tempered in favor of more exhaustive judicial review of Sunday legislation.[22] It would be a substantial improvement if courts acted as the court did in the *Pacesetter* case by giving the ordinance an exacting review in light of the purposes of the Illinois Sunday statute. While the legislature should retain its power to classify, the courts should look more closely for the relation between classification and the objects of classification. Courts, unlike legislatures, are not beset by direct

20 Pacesetter Homes, Inc. v. Village of South Holland, 18 Ill.2d 247, 163 N.E.2d 464, 468 (1960).

21 See JOHNSON AND YOST, SEPARATION OF CHURCH AND STATE IN THE UNITED STATES 255 (1948):

> Whatever work the state may undertake for the moral benefit of her subjects, the person's conscience should be respected. The claim put forth upon certain occasions that the design of Sunday laws is to secure liberty and health for the laboring classes does not reach the core of the question.

22 MCQUILLAN, MUNICIPAL CORPORATIONS § 18:19 (1946): "[t]he burden of proof of the ordinance's unreasonableness is on the party asserting it, since an ordinance is presumed to be reasonable."

pressure from either lobbyists or constituents, and are, at least theoretically, capable of a more detached and rational viewpoint.

The Illinois court reached a correct result through a reappraisal of legislative purpose, and thereby placed Illinois alongside the other states which have either abolished their Sunday laws or have taken steps to reduce their breadth. The court accomplished this by a recognition of the narrow purposes of the Sunday restrictions. If the legislature had, on the basis of legislative findings, determined that the exhibition of model homes, as a business, tended to disturb and prohibit others in their worship, the ordinance might have been upheld. The court in *Pacesetter,* however, reached a sound conclusion which forces religion on no one, yet provides religious worship a legitimate governmental protection.

James K. Stucko

SUPPORT OF DEPENDENTS — NECESSARIES — PUBLIC NEED FOR EDUCATED CITIZENS MAKES SUPPORT OF DEPENDENT MINOR'S COLLEGE EDUCATION A NECESSARY. — A divorced wife brought suit in Juvenile Court on the failure of her ex-husband to continue support payments to their eighteen-year-old son who was attending a university on a full tuition scholarship. Custody of the son was in the wife, although he was dependent on both parents. *Held,* petition for support granted. The public need for college-trained citizens makes a college education a "necessary" which a father must provide as support for a child who is in the custody of another during his minority. *Calogeras v. Calogeras,* 163 N.E.2d 713 (Ohio 1959).

According to the so-called English rule, the duty of a father to support his minor children is merely a moral obligation, and the father cannot be required as a matter of law to contribute to their support.[1] This rule is based on the idea that if a father could be required by law to support his children it would promote their idleness. The view adopted by a large majority of American courts, however, is that a parent or anyone in loco parentis has both a legal *and* moral duty to support his children.[2] The father's duty of support continues even though he is divorced and the custody of the child is awarded to the wife or a third person.[3] The support extends to those things which are necessary according to the parents' station in life,[4] and a husband cannot, by contract with his wife after divorce, relieve himself of this duty.[5]

"Necessary" is a flexible term which includes such education and training as will equip one for the ordinary duties of life.[6] As Schouler puts it, the value of the child to society depends on the development of his character through training.[7] The strength of a state, according to this theory, is derived not from an increase of population, but from an increase of well ordered and intelligent citizens. It is generally recognized that this duty to educate extends to a common school education.[8] Recent cases have reached divergent results on the question of college education.[9]

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1 Mortimore v. Wright, 6 Mees & W. 482 (1840), followed in Kelly v. Davis, 49 N.H. 187, 6 Am. Rep. 499 (1870).

2 Cashen v. Riney, 229 Ky. 779, 40 S.W.2d 339 (1931). For discussion, see Cohen v. Markel, 111 A.2d 702 (Del. Ch. 1955); MADDEN, PERSONS AND DOMESTIC RELATIONS §§ 110-11 (1931).

3 Luntsford v. Luntsford, 117 F.Supp. 8 (D.C. Mo. 1953); Owen v. Watson, 157 Tenn. 352, 8 S.W.2d 484 (1928).

4 Luntsford v. Luntsford, 117 F. Supp. 8 (D.C. Mo. 1953).

5 Cohen v. Cohen, 6 N.J. Super. 26, 69 A.2d 752 (Super. Ct. 1949).

6 Esteb v. Esteb, 138 Wash. 174, 244 Pac. 264 (1926).

7 SCHOULER, DOMESTIC RELATIONS § 235 (5th ed. 1895).

8 Werner v. Werner, 7 N.J. Super. 229, 72 A.2d 894 (Super. Ct. 1950). Underwood v. Underwood, 162 Wash. 204, 298 Pac. 318 (1931); SCHOULER, DOMESTIC RELATIONS § 235 (5th ed. 1895).

9 Pass. v. Pass, 28 U.S.L. WEEK 2483 (Miss. March 28, 1960), college education is a necessary if the parent can afford it. *Contra* Haag v. Haag, 163 N.E. 2d 243 (Ind. 1959).

Generally, the father loses his right to dictate what is necessary for his children when he loses custody of them.[10] Courts fear that the father will not be likely to allow such a benefit as a college education because of the added cost and the lack of benefit to himself.[11] The juvenile court has the power to determine the extent of the education which the child should receive under the "necessity" concept, since the child is under its jurisdiction until it comes of age.[12]

Middlebury College v. Chandler[13] enumerated the factors to be considered in determining whether education is a necessary: 1) the object must be judged as such from the conditions present in the surrounding society; 2) the financial ability of the father must be sufficient to provide for the education; 3) the social position of the family in society must justify the education as a necessary, and 4) the aptitude of the child must justify the expense.

Other courts have recognized that the financial ability of the father not only may, but must be considered.[14] Ability in this context includes such factors as present income, earning capacity, expenses, judgments outstanding against him, and fluctuations in the market for his services.[15] If the father's income increases, the divorce decree may be altered so that the child will receive more money while attending college.[16] The fact the father subsequently remarries and incurs added responsibilities does not of itself diminish the amount of support for the child of a previous marriage.[17] The standard of living enjoyed by the father can be sufficient evidence of his ability to pay for his child's college education; and he has the burden of proving a lack of ability to pay, the theory being that he is more likely to have exclusive knowledge of his financial abilities.[18]

The ability of the child is also taken into account. Many of the cases holding that a college education is a necessary involve children who have a very high aptitude for college work.[19] Grades alone are not controlling, however. Further factors to be considered are character, attitude, desire for learning and well-directed ambition.[20] The main fear apparently expressed in cases holding that a college education is not a necessary, in spite of sufficient ability on the part of the child, is that the child is old enough to be self-supporting.[21] But these cases are limited to a minority of jurisdictions.

A child of divorced parents should be allowed to obtain an education consistent with the parents' station in life.[22] However, it has been held a good defense that many fathers with greater means than the father in the principal case do not send their children to college.[23]

Some courts, in view of the number of state-supported, low-cost colleges, have concluded that public policy encourages college education — even at the expense of an unwilling parent.[24] This becomes particularly important as a corollary of

10 MADDEN, *supra* note 2, at § 113.
11 Esteb v. Esteb, 138 Wash. 174, 244 Pac. 264 (1926).
12 Johnson v. Johnson, 346 Mich. 418, 78 N.W.2d 218 (1956).
13 16 Vt. 683, 42 Am. Dec. 537 (1844).
14 Bernstein v. Bernstein, 282 App. Div. 30, 121 N.Y.S.2d 818 (Sup. Ct. 1953).
15 Jackman v. Short, 165 Ore. 626, 109 P.2d 860 (1941).
16 Hart v. Hart, 239 Iowa 142, 30 N.W.2d 748 (1948).
17 Peck v. Peck, 272 Wis. 466, 76 N.W.2d 316 (1956). For an extensive treatment of the problem, see Annot., 56 ALR2d 1202 (1956).
18 Jackman v. Short, 165 Ore. 626, 109 P.2d 860 (1941).
19 Johnson v. Johnson, 346 Mich. 418, 78 N.W.2d 216 (1956); Mapes v. Mapes, 336 Mich. 137, 57 N.W.2d 471 (1953); Esteb v. Esteb, 138 Wash. 174, 244 Pac. 264 (1926).
20 Titus v. Titus, 311 Mich. 434, 18 N.W.2d 883 (1945) (dissent); Jackman v. Short, 165 Ore. 626, 109 P.2d 860 (1951).
21 *E.g.*, Werner v. Werner, 7 N.J. Super. 229, 72 A.2d 894 (Super. Ct. 1950).
22 1 SCHOULER, MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS § 774 (6th ed. 1921); 6 IND. L.J. 278-80 (1931).
23 Commonwealth v. Wingert, 173 Pa. Super. 613, 98 A.2d 203 (1953).
24 Atchley v. Atchley, 29 Tenn. App. 124, 194 S.W.2d 252 (1945); Hale v. Hale, 55 Cal. App.2d 879, 132 P.2d 67 (Dist. Ct. App. 1942); Refer v. Refer, 102 Mont. 121, 56 P.2d 750 (1936); Esteb v. Esteb, 138 Wash. 174, 244 Pac. 264 (1926).

the theory that the court takes the power of decision from the father and vests it in itself at the time of divorce. One author has argued that a holding similar to that in *Calogeras* presents the danger that a doting mother may be encouraged to divorce her husband on grounds other than support in order for her child to obtain an education the father of the family otherwise could not be compelled to provide.[25]

In deciding whether a college education is a necessary, courts have been influenced by the educational level prevailing in society. In 1844, the *Middlebury College* decision[26] held that education was not a necessary because the majority of adults at that time passed through life with very little formal education. By 1926, however, it was recognized that a college education was becoming more prevalent because of easy access to many state supported colleges. Such an education was held to be a necessary for an exceptionally bright child whose father could afford it.[27] In 1941, *Jackman v. Short*[28] enlarged the meaning of necessary to include the needs of government and society as well as the likelihood that the child would be better able to support himself. However, reliance was still placed on the father's ability to pay.

The principal case appears to have extended the doctrine of the *Jackson* case still further. The court did not consider the father's ability to pay or the benefit of the education to the child, although these matters are almost universally considered in cases dealing with this subject. Instead, the court relied upon the benefit conferred on society by individuals with a college education. It stated:

> The United States . . . is being challenged by a most formidable competitor. . . . Russia with her giant strides in technology and science has not only caught up with us in the field of knowledge dealing with science and engineering, but has actually surpassed us. Witness their successful launching of the sputniks and their sending rockets to the moon. . . . To cope with the world challenge that faces us, our youth must be trained as citizens . . . to live in an America caught up inexplicably in an evolving world community which finds itself today in the throes of veritable technological and political revolutions.[29]

It is true that a college education is often a necessary, but the flexible concept of necessary developed by the courts is based on the particularities of each factual situation as well as on public policy. A rule that a college education is a necessary, based solely on ability of the child and public welfare concepts, might lead to curious results in its logical application. A father who is on the verge of becoming a pauper might be required to send his child, who is willing and able to support himself, through college at the insistence of a vexatious wife solely because there is a possibility that society might benefit from the child's education. Logically, the *Calogeras* case puts the child of an unbroken home in a materially better position than the child of a broken home. Despite the subtleties of the older cases, a return to the extensive tests already used in fitting education into the concept of necessary would seem to be in order.

Thomas J. Kelly

TORTS — MANUFACTURER'S LIABILITY — KNOWLEDGE OF A PRIOR DEFECT BY A NEGLIGENT INTERVENING PARTY DOES NOT SEVER CAUSAL CONNECTION BETWEEN ORIGINAL NEGLIGENCE AND ULTIMATE INJURY. — Brake units on 1953 Buick automobiles were defectively made, giving rise to sudden and complete brake failures. General Motors Corp. discovered the defect and supplied all dealer repair departments with kits to repair the brake units when the cars were brought to the dealer's repair shop. No notice was given to the purchasers of the cars and dealers

25 20 ORE. L. REV. 377-87 (1941).
26 16 Vt. 683, 42 Am. Dec. 537 (1844).
27 Esteb v. Esteb, 138 Wash. 174, 244 Pac. 264 (1926).
28 165 Ore. 626, 109 P.2d 860 (1941).
29 Calogeras v. Calogeras, 163 N.E.2d 713, 719 (1959).

were instructed not to inform Buick owners that they were making the repairs. The owner of one such Buick experienced brake failure and brought his car to a Buick repair shop, parking it outside the service area. He informed the assistant service manager that his brakes had failed and requested repair service. The service manager, forgetting that this was one of the faulty Buicks, drove it into the service area and being unable to stop the car, struck and injured the plaintiff, an employee of the dealer. Plaintiff brought an action against the owner, the service manager and General Motors. The actions against the owner and service manager were dismissed and a verdict was directed for General Motors on the theory that the driver's negligence severed any causal connection between the injury and the duty breached. On appeal, *held,* reversed. The manufacturer had a duty to take all reasonable precautions to warn *third party purchasers* of a latent defect discovered after the time of sale. Whether the causal connection between defendant's negligence and plaintiff's injury was severed by the driver's negligence is a matter for the jury. *Comstock v. General Motors Corp.,* 358 Mich. 163, 99 N.W.2d 627 (1959).

This case is another of the numerous manufacturer's liability cases that date from the 1928 holding in *MacPherson v. Buick Motor Car Co.*[1] Generally, these cases can be put into two groups: (1) those where liability is predicated on a breach of an express or implied warranty;[2] (2) those where recovery is based on the negligence of the manufacturer.[3] Since breach of warranty almost invariably is occasioned by a negligent act in the preparation of the product, warranty may be just one aspect of the negligence issue. The general rule has been that, unless there is privity of contract between a plaintiff and a defendant, no recovery is permitted.[4] A number of exceptions, however, have been developed and are commonly included in the "*MacPherson* rule." Foremost among these are injuries occasioned by inherently or imminently dangerous articles.[5] Negligence in the manufacture or preparation of food and beverages has also produced liability.[6] Other examples of the imposition of liability are: (a) negligence working in combination with anticipated forces which have caused injury;[7] (b) injury caused by a defective condition known to exist at a time of sale;[8] and (c) injury to a party invited by the owner to use a defective appliance on the owner's premises.[9]

There has also been a trend to extend the liability of third parties who have handled goods after sale. In one case a rebuilder of a rear-axle assembly was held liable when a wheel came loose and struck a woman standing on a nearby sidewalk.[10] In another, a repairer of tierods was held liable to a third party lessee

1 217 N.Y. 389, 111 N.E. 1053 (1928). See Freezer, *Manufacturer's Liability for Injuries Caused by His Products: Defective Automobiles,* 37 MICH. L. REV. 1 (1959), for an excellent history of the rule and good discussion by author of his idea of the basis of the rule.

2 *E.g.,* Roger v. Toni Home Permanent Co., 167 Ohio 244, 14 N.E.2d 612 (1958), where a warranty printed on a cosmetic was the basis of recovery for injuries suffered by a woman not a party to the contract.

3 *E.g.,* MacPherson v. Buick Motor Car Co., 217 N.Y. 389, 111 N.E. 1053 (1928).

4 Winterbottom v. Wright, 10 M. & W. 109, (1842); Roetting v. Westinghouse, 53 F. Supp. 588 (E.D. Mo. 1944).

5 See discussion in MacPherson v. Buick Motor Car Co., 217 N.Y. 389, 111 N.E. 1053 (1928). Imminently dangerous articles are those which when negligently made are dangerous to life or limb. Inherently dangerous articles are those which of their very nature are dangerous to life or limb. Thomas v. Winchester, 6 N.Y. 397 (1852).

6 *E.g.,* Drury v. Armour & Co., 140 Ark. 371, 216 S.W. 40 (1919). See PROSSER, TORTS § 84 2d ed. (1955).

7 *E.g.,* Farley v. Edward E. Tower & Co., Inc., 271 Mass. 230, 171 N.E. 639 (1930). An aspect of the imminently dangerous exception, wherein the defective item encounters other forces which it ordinarily would encounter and combine with them to do injury. See also, Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693 (1946).

8 Huest v. J.I. Case Threshing Machine Co., 120 Fed. 865, (8th Cir. 1903).

9 Bright v. Barnett Record Co., 88 Wis. 299, 60 N.W. 418 (1894).

10 Kalinowski v. Truck Equipment Co., 337 App. Div. 472, 261 N.Y.S. 654 (App. Div. 1933).

although the damage redressed was to property rather than to persons.[11] In fact, the exceptions to, and extensions of, the general rule of nonliability have become so numerous that some courts have made liability the rule.[12]

In *Comstock,* the court found that the defendant, General Motors, breached its duty by failing to use reasonable means to notify the purchaser of a latent defect discovered in the automobile by the manufacturer after the sale. To support its finding the court cited *Gerkin v. Brown & Sehler Co.*[13] Although the duty to notify the purchaser of danger was said to exist at the time of sale in *Gerkin,* it is an extension defensible in reason and justice to say that such a duty also exists in the circumstance of the present case. The suddenness with which the brake failure was likely to occur emphasizes the deadly nature of the defect. The ease with which names and addresses of purchasers could be obtained from the files of dealers mitigates the customary difficulty attending a manufacturer's warning third party purchasers. Furthermore, General Motors, if it desired to keep the information from the public for purposes of product confidence, can, arguably, be made to bear the loss. Information vital to public safety was withheld, and losses accruing from the benefits derived, or from the wrong committed, ought, the court said, to be borne by the perpetrator.

At first blush it appears that were this duty to warn fulfilled, it would be impossible to establish the manufacturer's liability. Certainly, as the court says, the owner would have had his car repaired immediately upon receiving the information. Such a line of reasoning ignores the sudden character of the brake failure, however. Even with warning a similar injury could easily have occurred. In fact, the driver in the present case had ample warning.

The defendant here has undoubtedly also breached another duty — the duty to exercise due care in the manufacture of brakes. This seems consistent with an earlier holding that an injury resulting to a pedestrian from a failure to exercise due care in rebuilding a rear axle was sufficient basis for recovery from the manufacturer,[14] a holding based, not on a concept of duty, but on the result of a discussion of intervening cause.[15]

In the principal case, the trial court held that the negligent act of the driver severed the causal connection between the plaintiff's injury and the manufacturer's negligence. Ample authority from other states supports the conclusion. In *Ford Motor Co. v. Wagoner*[16] the refusal by a prior purchaser of a hood latch replacement was held to sever any causal relation between the manufacturer's negligence and injury to a subsequent purchaser. In *Ford Motor Co. v. Achter*[17] the court denied recovery to a child who fell from her mother's car when a faulty latch permitted the door to open. The mother's negligent failure to have the door properly repaired was said to be superseding negligence. In *Comstock,* however, the appeal court distinguished the *Wagoner* and the *Achter* cases on the facts. *Wagoner* was distinguished on the basis that the seller had amply warned the prior purchaser of the defect, *i.e.,* the purchaser had knowledge of the defect. In *Achter* the distinction was that the purchaser knew more of the defect than the manufacturer. Despite these distinctions, however, the intervening negligence in these two cases

11 Central & Southern Truck Lines v. Westfall GMC, Inc., 317 S.W.2d 841 (Kansas City, Mo. Ct. App. 1958). See PROSSER, TORTS §§ 84-85 (2d ed. 1955), in which Dean Prosser briefly traces recovery allowed for injuries to persons and, as a later development, damage to property.

12 Todd Shipyards Corp. v. United States, 69 F. Supp. 609 (S.D. Me. 1947); Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693 (1946).

13 177 Mich. 45, 143 N.W. 48 (1907). Fur coats sold to plaintiff known to be occasionally dangerous to human skin; court found a duty to warn buyers of this proclivity.

14 Kalinowski v. Truck Equipment Co., 337 App. Div. 472, 261 N.Y. Supp. 654 (1933).

15 See generally Comment, 1960 DRAKE L.J. 88.

16 183 Tenn. 392, 192 S.W.2d 840 (1946). See Annot., 164 A.L.R. 371 (1946).

17 310 S.W.2d 510 (Ky. 1957).

could pass the tests of foreseeability posited in the Michigan opinion with at least as much ease as the intervening negligence in the present case. The intervening acts in both *Wagoner* and *Achter* (1) caused injuries "not different in kind from that which would have resulted from the prior act . . . ." and (2) were such that the original negligent actor ". . . should have realized that a third person might so act," or (3) ". . . would not regard it as highly extraordinary that the person had so acted, ..."[18]

That the Michigan court did not discern these similarities in cases producing opposite results does not detract from the correctness of the holding. It merely illustrates the confusion as to the true basis of liability in manufacturer's liability cases, and the common difference of opinion as to what constitutes a proximate cause, particularly where there is an intervening cause.[19]

What is the true basis of liability in manufacturer's liability cases? Pointing to the fact that knowledge by the manufacturer of the defect has been required by at least one court to impose liability for imminently dangerous articles, it has been said that deceit is the true basis.[20] However, in *Central & Southern Truck Lines v. Westfall GMC Truck, Inc.*[21] (Following *MacPherson*), it was said that the rules of negligence apply.

Thus, the lines are drawn: either the basis is a deceitful act or a breach of a duty. However, the intentional aspects of deceit militate against its being the basis. Since a contract, fiduciary, or other relationship is necessary to a deceit action,[22] the absence of privity in many manufacturer's liability cases leads to the conclusion that some other basis must exist. Left, however, are the remnants of deceit — misrepresentation, notice, etc. — to plague the doctrine in its natural habitat of negligence.[23] As in the case under discussion, the obligation to give notice is the duty breached. By the use of proximate cause, defenses common to deceit are ingeniously raised to thwart the negligence basis of the doctrine. It is here that the result of the present case makes a distinct contribution.

In the *Achter* case, *knowledge* by the mother (intervening actor) thwarted the imposition of liability. So also in *Wagoner, knowledge* by a prior purchaser (intervening actor) blocked recovery. In the present case, the intervening actor had similar knowledge of the defects, but the Michigan court dismisses the facts as nondeterminative. The difference between *Comstock* and the preceding cases is primarily a difference of opinion as to what is necessary to constitute a superseding, intervening cause. Knowledge of prior negligence by the intervening actor does not assume such importance in the test of foreseeability common to technical definition in the RESTATEMENT OF TORTS:

> The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial and continuing factor in bringing about, if
>
> (a) the actor at the time of his negligent conduct should have realized that a third person might so act, or
>
> (b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, ...[24]

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18 See RESTATEMENT, *infra* note 24.

19 It is suggested that the difference is resolved by discerning factual differences which do not, in the main, touch upon the usual modes of testing these causes, *e.g.*, RESTATEMENT, TORTS §§ 440-42, 447, cited in the *Comstock* opinion.

20 Annot., 164 A.L.R. 371, 376 (1946).

21 317 S.W.2d 841 (Kansas City, Mo. Ct. App. 1958).

22 *Cf.* Pasley v. Freeman, 3 Term Rep. 51, 100 Eng. Rep. 450 (1789). Deceit action lay for inducing one by a misrepresentation to act for the benefit of a third party. See also PROSSER, TORTS § 86, p. 522 (2d ed. 1955). Some relationship must be used as a vehicle for misrepresentation.

23 Similar thoughts are expressed in Annot., 164 A.L.R. 371 (1946).

24 RESTATEMENT, TORTS § 447. See also SEAVEY, COGITATIONS ON TORTS 31-35 (1954); 2 HARPER & JAMES, TORTS § 28.5 (1956).

One is hard pressed to escape the conclusion that this type of a definition is essentially a normative guide. It indicates, as Professor Seavey says, ". . . [A] legalism used to indicate the presence or absence of liability."[25] Seavey proceeds to say that the real question is, was the injured party within the risk contemplated by the prior negligent act? In the present case, the question of whether that negligence was both a substantial and a continuing factor in the injury should have been left to the jury. Combining Mr. Seavey's view with the question left to the jury in the *Comstock* case, there is produced a concept of intervening, superseding cause more constant with the negligence basis of liability than those concepts which, however slightly, look to the principles of deceit to grant or deny liability. Each case is to be left to its facts without sonorous adjectives to confuse both judge and jury. Professor Green said of these adjectives.

> Attempts are still being made to make these metaphysical solvents do service. . . . The moment they are crystallized into a formula trouble necessarily begins. They then become not the means of communicating thought, but the subjects of interpretation. The real problem is lost in the attempt to unravel its alleged solvents. . . . The real problem is made to await the determination of an immaterial as well as fantastic side issue. . . . [I]t would be much easier to solve the real problem in the first instance.[26]

The present opinion succeeds in escaping the "solvents." It succeeds in placing the definitions of proximate, intervening, and superseding cause in their proper perspectives as wide, normative guide lines. More important, by ignoring the knowledge of the defect by the intervening actor, the court removes one more remnant of deceit from the law of manufacturer's liability. It would appear that, despite the spurious distinctions among conflicting precedents, such knowledge no longer affects intervening negligence in Michigan in manufacturer's liability cases. It is reasonable that a negligent manufacturer should realize that knowledge of a defect by an intervening third party, and negligence in spite of this knowledge, are not incompatible in the course of human affairs.

Such progress in this field is desirable. If manufacturer's liability is based on negligence, a return to the rules of negligence, discarding outmoded elements of deceit in the process, is indeed a welcome development.

Joseph P. Albright

UNIONS — DISCRIMINATION — MUNICIPAL ORDINANCE REQUIRING ALL PRINTING BOUGHT BY CITY TO BEAR THE LABEL OF A LABOR COUNCIL DECLARED VOID AS DISCRIMINATORY AND VIOLATIVE OF THE STATE CONSTITUTIONAL BAN ON MONOPOLIES. — The owners of a printing company brought suit to enjoin the city of North Little Rock, Arkansas, from enforcing a city ordinance, adopted in 1904, which required that all printed matter, blank books, and stationery used by the city bear the union label of the Allied Printing Trades Council. Plaintiffs alleged that their company had a contract with a recognized labor union, the Amalgamated Lithographers of America, but was not entitled to use the union label specified in the ordinance and was thus excluded from the opportunity to sell any printed matter to the city. The city made no defense, but officers of the Allied Printing Trades Council were permitted to intervene as defendants. *Held,* injunction granted. A municipal ordinance that attempts to confine the award of public contracts to persons privileged to make use of a particular union label is void as discriminatory and violative of the state constitutional ban on monopolies. *Upchurch v. Adelsburger,* 332 S.W.2d 242 (Ark. 1960).

The Allied Printing Trades Council, whose label is involved here, is made up of four AFL-CIO trade unions: the Typographers, the Printing Pressmen, the

25 SEAVEY, *op. cit. supra* note 24, at 32.
26 GREEN, RATIONALE OF PROXIMATE CAUSE 143 (1927).

Bookbinders, and the Stereotypers. The Allied label may be used by any printing shop that has contracts with at least two of these four unions.[1]

Union labels do not occupy the same position as trademarks at common law and they are generally not afforded the protection against unauthorized use and counterfeiting given to technical common law trade-marks.[2] This is because of the peculiar function of a union label, which is not intended as an index to the quality of the articles to which they are attached, but rather, to indicate that union labor was used in their manufacture. In the absence of common-law protection, many states have enacted statutes designed to protect unions against the unauthorized or counterfeit use of their label. These statutes usually a) give the union the right to obtain an injunction halting the unauthorized use,[3] or b) make unauthorized use or counterfeiting a criminal offense.[4]

Controversies arise when a state or municipality seeks to give union labor a favored position by requiring that all public printing bear a specified label. State statutes to this effect are rare,[5] but municipal ordinances and resolutions have occasioned a number of suits.[6] The requirement that all public printing bear the union label is simply an indirect method of requiring that union labor be used in connection with public printing contracts; the problem created by such ordinances tends to merge into the larger area involving requirements that only union labor be used in connection with public works contracts, or that a specified minimum wage be paid on all public works contracts. None of these ordinances has fared very well in the courts.[7] They have been struck down as discriminatory,[8] mono-

1 Upchurch v. Adelsburger, 332 S.W.2d 242, 243 (1960). See also INTERNATIONAL TYPOGRAPHICAL UNION LAWS 134 (1958).

2 2 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING § 468 (1940).

3 *E.g.*, ARK. STAT. §§ 70-526 to 70-538 (Supp. 1957); COLO. REV. STAT. ANN. § 141-1-1 (1953); CONN. GEN. STAT. REV. §§ 35-12 to 35-18 (1958); FLA. STAT. ANN. § 506.09 (1943); IDAHO CODE ANN. § 44-605 (1948); ILL. ANN. STAT. ch. 140, §§ 8, 18, 19, 22 (Smith-Hurd Supp. 1959); IOWA CODE ANN. §§ 548.1-548.11 (1950); ME. REV. STAT. ANN. ch. 30, § 59 (1954); MASS. ANN. LAWS ch. 110, § 8 (1954); N.J. STAT. ANN. §§ 56:3-1 to 56:3-13 (1956); N.Y. LAB. LAW §§ 208, 209; TENN. CODE ANN. §§ 69-501, 69-509 (1956); UTAH CODE ANN. §§ 70-1-1 to 70-1-6 (1953); WIS. STAT. ANN. § 132.16 (1957).

4 *E.g.*, FLA. STAT. ANN. § 506.06 (1943); IDAHO CODE ANN. § 44-601 (1948); ILL. ANN. STATS. ch. 140, §§ 24-27 (Smith-Hurd Supp. 1949); IOWA CODE ANN. §§ 548.1-548.11 (1950); ME. REV. STAT. ANN. ch. 30, § 60 (1954); MASS. ANN. LAWS ch. 266, § 69 (1954); N.J. STAT. ANN. § 56:3-7 (1956); N. Y. LAB. LAW § 209; UTAH CODE ANN. §§ 70-1-1 to 70-1-6 (1953); WIS. STAT. ANN. § 132.16 (1957).

5 *E.g.*, MONT. REV. CODES ANN. § 82-1138 (Supp. 1955): "All printing for which the State of Montana is chargeable, . . . shall have the label of the International Typographical Union of the city in which they are printed." NEV. REV. STAT. § 344.060 (Supp. 1957): "The superintendent of state printing shall cause to be affixed to all public printing the union label recognized by the International Typographical Union. . . ." *But see,* State v. Mitchell, 105 Mont. 326, 74 P.2d 417 (1937), where absence of the union label was held not to prevent the state from purchasing from an out of state printing company. The statute in force at that time has been re-enacted in the present code.

6 Amalithone Realty Co. v. City of New York, 162 Misc. 715, 295 N.Y.Supp. 423 (Sup.Ct. 1937); Neal Publishing Co. v. Rolph, 169 Cal. 190, 146 Pac. 659 (1915); Miller v. City of Des Moines, 143 Iowa 409, 122 N.W. 226 (1909); Marshall & Bruce Co. v. City of Nashville, 109 Tenn. 495, 71 S.W. 815 (1903); State v. Toole, 26 Mont. 22, 66 Pac. 496 (1901); City of Atlanta v. Stein, 111 Ga. 789, 26 S.E. 932 (1900); Holden v. City of Alton, 179 Ill. 318, 53 N.E. 556 (1899).

7 Philson v. City of Omaha, 167 Neb. 360, 93 N.W.2d 113 (1958); Mugford v. City of Baltimore, 185 Md. 266, 44 A.2d 745 (1945); Wilson v. City of Atlanta, 164 Ga. 560, 139 S.E. 148 (1927); Lewis v. Board of Education, 139 Mich. 306, 102 N.W. 756 (1905); Fiske v. People, 188 Ill. 206, 58 N.E. 985 (1900); Adams v. Brennan, 177 Ill. 194, 52 N.E. 314 (1898). *Cf.* Adams v. City of Albuquerque, 62 N.M. 208, 307 P.2d 792 (1957); State v. Johnson, 46 Wash. 2d 114, 278 P.2d 662 (1955). See also Anthony P. Miller, Inc. v. Wilmington Housing Authority, 165 F. Supp. 275 (D. Del. 1958) (dicta). *But see* Pallas v. Johnson, 100 Colo. 449, 68 P.2d 559 (1937) to the effect that award of a municipal contract can be made exclusively to contractors employing union labor when, due to labor

polistic,[9] unconstitutional,[10] or violative of laws requiring that public works be awarded to the lowest bidder.[11]

> On principle it would seem that, as the primary duty of the public officers is to secure the most advantageous contract possible for accomplishing the work under their direction, any regulation which prevents the attainment of this end is invalid. A law demanding competition in the letting of public work is intended to secure unrestricted competition among bidders, and hence, where the effect of an ordinance is to prevent or restrict competition and thus increase the cost of the work, it manifestly violates such law and is void, as are all proceedings had thereunder. It may be further observed that, according to the judicial view so far declared, all such ordinances are void on the constitutional ground of discrimination.[12]

In general, the same objections found to be valid against requiring union labor *per se* are applicable against a requirement that all public printing bear the union label.

In the older cases, the parties in conflict were union interests on the one side and non-union interests on the other. In *Amalithone Realty Co. v. City of New York*,[13] however, the plaintiffs did not complain of a *union—non-union* type of discrimination, but that the city, in selecting the label of one union rather than another, had indulged in *union—union* discrimination. The court invalidated the resolution on the basis of this complaint. In doing this, however, the court indicated that it would have reached a different conclusion had the discrimination created by enforcement of the resolution been of the *union—non-union* type:

> The city of New York is justified in its demand that the materials and supplies sold to it . . . be manufactured by union labor. . . . Much progress has been made in economic thinking. . . . Even though the immediate cost in dollars and cents to the city may be higher than the cost of sweatshop products, we have now come to recognize the greater ultimate cost to the people as a whole which results from low wages, overlong hours, and unsanitary working conditions. The presence of the union label may reasonably be considered as a fair assurance that the products have been manufactured under conditions in accord with our present-day social consciousness.[14]

Thus, although the resolution was invalidated, the court invoked a rationale different from that employed in the older cases. The court suggested that its ruling in this matter would have been different had it been shown that the union excluded was not in fact a bona fide labor union organized solely for the benefit of the workers in the industry. The city's right to discriminate between union and non-union interests in letting public contracts was implicitly upheld, but not the right to discriminate between *equally deserving* unions.

The right of a city to indulge in the *union—non-union* type of discrimination was denied, however, in *Mugford v. City of Baltimore*.[15] The plaintiff sought to have a contract between the city and the Municipal Chauffeurs, Helpers, and Garage Employees Union declared void, "and to restrain the city from extending a preferential advantage to the Union." In granting the plaintiff's request the court said:

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conditions, they are in a better position to assume the early completion of the contract where such early completion is deemed desirable. This particular rational was contradicted, however, in State *ex rel.* United Dist. Heating, Inc. v. State Office Building Commission, 125 Ohio 301, 181 N.E. 129 (1931), where the court said: "The claim is made that costly delays and added expenses may occur because of possible trouble, if this contract is not awarded to the bidder employing union labor. This claim assumes that a great state cannot control its laws requiring public bidding; cannot protect its citizens from unconstitutional discriminations."

8 Mugford v. City of Baltimore, 185 Md. 266, 44 A.2d 745 (1945).
9 Wilson v. City of Atlanta, 164 Ga. 560, 139 S.E. 148 (1927).
10 State v. State Office Bldg. Comm'n, 125 Ohio 301, 181 N.E. 129 (1931).
11 Philson v. City of Omaha, 167 Neb. 360, 93 N.W.2d 113 (1958).
12 10 McQUILLIN, MUNICIPAL CORPORATIONS § 29.48 (3d ed. 1950).
13 162 Misc. 715, 295 N.Y.Supp. 423 (Sup.Ct.1937).
14 *Id.* at 425.
15 185 Md. 266, 44 A.2d 745 (1945).

> It has been frequently held that a municipality, in performing work or other duties it is required by law to do, cannot discriminate in favor of members of a labor union. Such action would not only be unlawful but would also tend to constitute a monopoly of public service by members of a labor union, which the law does not countenance. By the same force of reasoning, a citizen who is a member of a union cannot, by that fact alone, be barred from a position in the public service.[16]

The Maryland court, then, contrary to what was said in *Amalithone,* denied to the city any right to discriminate against non-union labor. This case, of course, did not involve a union label. However, since the requirement of a label is merely a device for indirectly favoring a specific labor union in public printing contracts, the rationale underlying the decision in *Mugford* would seem to apply equally well to union label cases.

In the principal case it is to be noted that the unions whose interests are in conflict are the same as in *Amalithone.* Instead of relying on *Amalithone,* however, the Arkansas Supreme Court chose rather to follow two old cases, *City of Atlanta v. Stein*[17] and *Marshall & Bruce Co. v. City of Nashville.*[18] In those cases the union label in question was that of the Allied Trades Council. The present plaintiffs, perhaps mindful of what was said in *Amalithone,* felt it advisable to point out, lest they be characterized as proprietors of a sweat shop, that they, too, had a contract with a union. The defendants also testified as to the high quality of the printing which bears the Allied label and the details of the four component unions' retirement plans and other benefits. This was done apparently in an effort to show, on the plaintiffs' part that *union—union* discrimination (condemned in *Amalithone*) was being indulged in; and, on the defendants' part, that the discrimination, if any, was of a *superior union—inferior union* type (discrimination apparently condoned in the *Amalithone* opinion). The court said of this testimony: "We do not detail this testimony, which is not disputed, as it does not control the outcome of the case."[19] The court then goes on to strike down the ordinance as being discriminatory[20] and irreconcilable with the Arkansas constitutional provision against monopolies,[21] and the state statute controlling competitive bidding on municipal purchases.[22] In declining to inquire as to the relative merits of the two unions involved, the instant court rejected the reasoning of the *Amalithone* case. The New York court apparently would not have objected to the exclusion of a non-union company. In contrast, the Arkansas court does not base its decision on the fact that one of the excluded parties was a union. Rather, it apparently denies a city's right to indulge in discrimination in the letting of public contracts (specifically, discrimination of the *union—non-union* type). Thus, the plaintiffs' allegation that their company had a contract with a recognized labor union was probably unnecessary. The Supreme Court of Arkansas has, in a sense, re-affirmed the old line of cases which date back to the early days of the trade union movement.[23]

Since the early cases were decided, a great change in public opinion and policy has taken place in favor of industrial and trade unions. The Clayton,[24] Norris-LaGuardia[25] Acts increased the bargaining power and influence of American

16 *Id.* at 747.
17 111 Ga. 789, 36 S.E. 932 (1900).
18 109 Tenn. 495, 71 S.W. 815 (1903).
19 Upchurch v. Adelsburger, 332 S.W.2d 242, 243 (1960).
20 See McQUILLAN, *op. cit. supra* note 12.
21 ARK. CONST. art. 2, § 19. "Perpetuities and monopolies are contrary to the genius of a republic, and shall not be allowed. . . ."
22 ARK. STAT. § 19-1022 (Supp. 1956). " . . . where the amount of expenditure involved . . . may exceed three hundred dollars ($300.00), said Board shall transmit to the city council an estimate thereof, and an ordinance authorizing such expenditure . . . , and, upon the passage of such ordinance, it shall be the duty of said Board to advertise and let the work or contract to the lowest responsible bidder. . . . "
23 Cases cited notes 6, 7 *supra.*
24 38 Stat. 732, 15 USC § 17 (1914).
25 47 Stat. 70, 29 USC § 103 (1932).

labor unions,[26] and were enacted in response to a growing public awareness of the social desirability of the legitimate goals of labor. This being true, one might expect that *Upchurch,* which in a manner of speaking, has been hanging-fire for the fifty-six years since the ordinance in question was enacted, would reach a different result. Unlike the turn of the century cases, Upchurch was not litigated at a time in American history when popular opinion and policy were running strongly against unions. Nevertheless, we find a modern court reaching the same decision as was reached in the early cases, and for the same reasons. At first glance, *Upchurch* might appear inconsistent with the modern viewpoint on labor. Actually, however, the Arkansas court is declining, as other courts have declined, to condone the replacement of the anti-union discrimination of the past with a pro-union discrimination. If municipal governments were allowed to exclude non-union interests from public printing contracts, a situation analogous to the yellow dog contracts of the twenties would result. The only difference would be the direction of the discrimination. To the suggestion that all workers are free to join unions,[27] and thus are not excluded by such ordinances from performance of the city's work, an early court replied: "So any man could become a Democrat, a Presbyterian, or Catholic. . . . But he is not compelled to do this."[28]

The principle that seems to underlie all these decisions may, perhaps, be simply expressed as follows: Government, which exists for the benefit of all and to the support of which all are required to contribute, owes a responsibility to all of its citizens, regardless of union affiliation or lack of it.[29]

Daniel J. Manelli

WILLS — FOREIGN LEGATEES — POWER OF ATTORNEY AND ASSIGNMENT OF ESTATE FOR ATTORNEY'S FEES DENIED BECAUSE OF POSSIBILITY OF LEGATEES NOT RECEIVING ESTATE PROCEEDS DUE TO POLITICAL CLIMATE IN LEGATEES' DOMICILE. — The Surrogate's Court withheld from Hungarian nationals their distributive shares of the estate of a deceased citizen of New York until such time as payments could be made to their benefit. The attorney for the Hungarian legatees petitioned the Surrogate's Court to allow him to exercise his power of attorney to purchase "Ikka" packages[1] at the rate of $250.00 per month to the extent of the legatee's respective shares in the estate, as a method of providing the legatees with the beneficial enjoyment of their legacies. He further petitioned the court to recognize the assignment of 25 per cent of the distributee's share in consideration of legal services rendered. The Surrogate's Court denied both petitions, relying upon section 269 of the New York Surrogate's Court Act. On appeal, *held,* affirmed.

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26 *E.g.,* United States v. Hutchenson, 312 U.S. 219 (1941).

27 See generally Note, 34 NOTRE DAME LAW. 384 (1959).

28 Marshall & Bruce Co. v. City of Nashville, 109 Tenn. 495, 71 S.W. 815 (1903).

29 *Cf.* Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949). The Court, in upholding a right to work law, said at 537: "Just as we have held that the due process clause erects no obstacle to block legislative protection of union members, we now hold that legislative protection can be afforded non-union workers."

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1 Letter from U. S. Dep't. of Commerce, Bureau of Foreign Commerce, Washington 25, D.C., to the NOTRE DAME LAWYER, April 18, 1960, on file Notre Dame Law Library.
MONIMPEX IKKA is a Hungarian nationalized enterprise established to handle the sale of gift certificates for the distribution of standardized gift parcels made up from stacks of goods warehoused in Hungary. Under the IKKA system a donor in this country purchases for dollars a gift certificate for a particular standardized from an IKKA agent. The certificate is sent to the prospective recipient in Hungary who receives the gift from one of the IKKA depots in that country.

For reasons stated in *In re Herz' Will*,[2] the legacies were withheld by the Surrogate's Court. The assignment for attorney's fees was denied because the legatees were in no position to receive their distributive shares and, could not place an assignee in a better position than they themselves enjoyed as beneficiaries. *In re Geiger's Estate*, 7 N.Y.2d 109, 164 N.E.2d 99(1959).

Section 269 of the New York Surrogate's Court Act was amended in 1939 to provide for withholding legacies in foreign legatee cases[3] due to existing world conditions.[4] Europe was in the process of being overrun by Nazi Germany, and communism, with its attendant abolition of private property, was firmly entrenched in the Soviet Union. Prominent in the activities of these countries was the confiscation of money received by their citizens from benefactors in the United States. To alleviate this condition, the New York Legislature empowered the Surrogate's Court to withhold payment of legacies to residents of countries where it appeared that the "payments might be circumvented by confiscation in whole or in part."[5] The object of this legislation was to promote the implied or express wishes of the decedent as to the disposal of his assets, and, secondarily, to prevent the distribution of United States assets into the hands of nations with antagonistic political and economic ideologies.[6]

The Surrogate's Court in *In re Weideberg's Estate*[7] withheld legacies, payable to German nationals of the Jewish race, reasoning that in view of the attitude of the German government toward Jews, the possibility of their receiving the inheritance was doubtful. In *In re Landau's Estate*[8] the Surrogate's Court withheld legacies payable to a citizen of the U.S.S.R. on the ground that it was unlikely she would receive the money, since private property had been abolished in the Soviet Union.[9]

Since World War II, section 269 has been primarily used to withhold legacies payable to nationals of Soviet bloc nations, the so-called "iron curtain" countries. Since similar statutes have been enacted in several other states for the same purposes,[10] such legislation has been termed the "iron curtain" rule."[11]

In many cases where legacies have been willed to residents of "iron curtain" countries,[12] the Surrogate's Court has based its decision to withhold the legacies

2 7 Misc.2d 217, 163 N.Y.S.2d 349, 350 (Surr. Ct. 1957: "Recent events in Hungary have not been reassuring so as to render it likely that the beneficiaries would have the benefit, use and control of the property in question."

3 N.Y. SURR. ACT, § 269, as amended by N.Y. Sess. Laws 1939, ch. 343, § 2.

> [W]here it shall appear that a legatee, distributee, or beneficiary of a trust would not have the benefit or use or control of the money or other property due him, or where other special circumstances make it appear desirable that such payments should be withheld, the decree may direct that such money or other property be paid into the surrogate's court for the benefit of such legatee, distributee, or beneficiary of a trust, or such person or persons who may thereafter appear to be entitled thereto. Such money or other property so paid into court shall be paid out only by special order of the surrogate or pursuant to the judgment of a court of competent jurisdiction.

4 See *In re* Weideberg's Estate, 172 Misc. 524, 15 N.Y.S.2d 252, (Surr. Ct. 1939).

5 *Id.* at 256. Note explanatory of the scope and purpose of the New York Surrogate's Court Act, section 269, as amended by N.Y. Sess. Laws 1939, ch. 343, § 2, which was appended to the bill at the time of its enactment.

6 *Ibid.*

7 *Ibid.*

8 172 Misc. 651, 16 N.Y.S.2d 3 (Surr. Ct. 1940). On rehearing, the court ordered the legacy to be paid to the beneficiary. 187 Misc. 925, 16 N.Y.S.2d 16 (Surr. Ct. 1946).

9 See also *In re* Bold's Estate, 173 Misc. 545, 18 N.Y.S.2d 291 (Surr. Ct. 1940).

10 See CONN. GEN STAT. REV. § 45-278 (1958); MD. ANN. CODE Art. 93, § 161 (1957); MICH. STAT. ANN. § 27.3178 (306a) (Supp. 1959); N.J. STAT. ANN. § 3A: 25-10 (1953); ORE. REV. STAT. tit. 12, § 111.670 (1957).

11 Heyman, *The Nonresident Aliens Right to Succession Under the Iron Curtain Rule*, 52 NW. U.L. REV. 221 (1957).

12 See, *e.g.*, *In re* Niggol's Estate, 202 Misc. 290, 115 N.Y.S.2d 557 (Surr. Ct. 1952; *In re* Geffin's Estate, 199 Misc. 756, 104 N.Y.S.2d 490 (Surr. Ct. 1951); *In re* Best's Estate, 200 Misc. 332, 107 N.Y.S.2d 224 (Surr. Ct. 1951); *In re* Thomae's Estate, 199 Misc. 940,105 N.Y.S.2d 844 (Surr. Ct. 1951).

upon information provided in United States Treasury Department circulars,[13] the rationale being that the circulars indicated an improbability that nationals in "iron curtain" countries would receive their inheritances.[14] The court has made it clear that section 269 is not punitive in nature, and was not enacted to enable the court to divest foreign beneficiaries of their inheritances. Its purpose is to protect the interests of the legatees until they are able "freely" and "fully" to enjoy them.[15]

However, in spite of the protective features of this legislation, foreign beneficiaries have attempted to withdraw the inheritances held for them by the Surrogate's Court. To facilitate these attempts, the legatees have executed powers of attorney over their legacies to United States citizens,[16] and have made assignments of their distributive shares to persons whom the Surrogate's Court might consider in a position to enjoy the benefits of the payments.[17] The court has condemned these agreements as attempts to circumvent the provisions of the statute,[18] and has declared that "The law of New York State forbids payment, other than to the individual distributee, of sums which may be due him in situations in which it appears to be a reasonable possibility that he will not receive the benefit thereof."[19]

In light of this background, it would appear that a different result should have been reached in the Geiger case as to the proposed power of attorney to purchase "Ikka" packages. These packages, being "free of duty and any taxation,"[20] would have afforded the Hungarians substantial benefit without the risk of confiscation. This is alleged especially true in light of the Hungarian legatees' lack of basic alleged necessities.[21] Other methods of conveying gift packages to Hungary are inferior to "Ikka" because of the high taxes imposed upon them.[22] Furthermore, the United States has no present prohibition against sending packages to Hungary which might have justified the court in refusing to recognize the power of attorney to send "Ikka" packages.[23]

If the Geiger court had recognized the power of attorney, it still would have retained direct control of its exercise, since, if the situation should arise wherein the Hungarians were not receiving the "benefits" of their legacies, the court could immediately terminate the allowance of the monthly payments.[24]

One author has suggested that courts, by withholding legacies in such cases, in reality are denying to the foreign beneficiaries the "benefit of their legacies, even when the tax rates of the foreign governments are confiscatory. He points out that if the beneficiaries must wait until they are in a position to receive the funds, it is unlikely that they will ever receive anything.[25]

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13 U.S. Treas. Dep't Circular 655 issued pursuant to Exec. Order No. 8389, 16 Fed. Reg. 1818 (1954).

14 *In re* Braier's Estate, 305 N.Y. 148, 111 N.E.2d 424, 428 (1953).

15 See *In re* Well's Estate, 204 Misc. 975, 126 N.Y.S.2d 441, 444-45 (Surr. Ct. 1953).

16 See *In re* Getream's Estate, 200 Misc. 543, 107 N.Y.S.2d 225 (Surr. Ct. 1951). See also *In re* Geiger's Estate, 12 Misc.2d 1043, 175 N.Y.S.2d 588 (Surr. Ct. 1957).

17 *In re* Perlinsky's Estate, 202 Misc. 351, 115 N.Y.S.2d 549 (Surr. Ct. 1952).

18 *In re* Getream's Estate, 200 Misc. 543, 107 N.Y.S.2d 225 (Surr. Ct. 1951), labeled the execution of powers of attorney as attempts to circumvent Section 269. *Accord, In re* Perlinsky's Estate, 202 Misc. 351, 115 N.Y.S.2d 549, 556 (Surr. Ct. 1952): "The alleged assignment herein has the same baneful effect as the power of attorney in Matter of Getream."

19 *In re* Perlinsky's Estate, 202 Misc. 351, 115 N.Y.S.2d 549, 551 (Surr. Ct. 1952). See also *In re* Bold's Estate, 173 Misc. 545, 18 N.Y.S.2d 291 (Surr. Ct. 1940); *In re* Weideberg's Estate, 172 Misc. 524, 15 N.Y.S.2d 252, 259 (Surr. Ct. 1939).

20 *In re* Geiger's Estate, 7 N.Y.2d 109, 164 N.E.2d 99, 101 (Surr. Ct. 1959) (dissenting opinion).

21 *Id.* at 101.

22 For information on the tax rates imposed on gift packages sent from The United States to Hungary, see U.S. Dep't of Commerce, Sending Gift Packages To Hungary (1959).

23 *Ibid.*

24 See *In re* Well's Estate, 126 Misc. 975, 107 N.Y.S.2d 441, 446 (Surr. Ct. 1953): "If this court had available to it any means of supervising the payment of funds to nationals of these countries and for assuring itself of the beneficiary's ability to hold and enjoy it, the issue would be capable of ready solution."

25 Heyman, *supra* note 11.

For these reasons, the withholding of the legacies in *Geiger* appears to be in conflict with the purpose of Section 269.[26] The object of fulfilling the wishes of the testator is frustrated[27] if it may reasonably be presumed that the decedent would have preferred his estate to have been used to purchase much-needed items for his devisees, rather than to have his estate held by the Surrogate's Court, thereby benefiting no one.

In regard to the assignment for legal services, Section 269 forbids payment to anyone other than the individual distributee where there is a reasonable possibility that the "benefit" of the legacy will not accrue to the legatees.[28]

The *Geiger* court, in denying the assignment, reasoned that since the legatees were in no position to receive their legacies, they could not put an assignee in a better position than they, as assignors, enjoyed. If this reasoning is pursued to its logical extreme, no assignment, under any circumstances, no matter how beneficial to the legatees, can be allowed. The application of this reasoning, could conceivably deny a legatee the "benefit" "use" and "control" of his legacy, and directly subvert the express purpose of Section 269. Such an application of the statute approaches the position of being punitive, a result the court has been reluctant to reach.[29]

In spite of the court's questionable reasoning, however, the decision appears proper under the circumstances surrounding the proposed assignment. The dangers of allowing such an assignment are much greater than those accompanying permission to execute the power of attorney to purchase "Ikka" packages. The power of attorney could have been controlled,[30] but the assignment would have been final, and any damages sustained by the legatees would have been irreparable.

If the court were to allow assignments in these circumstances, the problem of where to draw the line as to the amount of the assignments would arise. The possibility of unscrupulous attorneys overcharging foreigners, and of assignments fraudulently induced by relatives or supposed friends in the United States, is manifest.

The refusal to recognize the proposed assignment worked no great hardship upon the attorney in the present case. Under New York law, he is entitled to the reasonable value of his services.[31] Although the attorney's expectation as to the size of his fee may not be realized, his compensation will be just. Moreover, were the courts to make the attorney's expectations a more important end than the assurance of the beneficial use of the legacies by the Hungarian beneficiaries, a dangerous precedent would result.

The New York court has repeatedly withheld legacies from foreign beneficiaries where the benefits did not enure directly to them. The court has refused to recognize assignments and powers of attorney executed by legatees because of possible dangers to the beneficial use of the legacies accompanying such devices. But, in *Geiger,* the dangers which prompted the court to deny recognition of these devices were not present in the attempted exercise of the power of attorney, although they did accompany the proposed assignment. Therefore, only the assignment was properly denied. Furthermore, the reasoning by which the court arrived at its decision was so narrowly construed that conflicts with section 269 will possibly result.

James E. Gould

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26 N.Y. SURR. CT. ACT, § 269, as amended by N.Y. Sess. Laws 1939, ch. 343, § 2.
27 *In re* Weideberg's Estate, 172 Misc. 524, 15 N.Y.S.2d 252, 256 (Surr. Ct. 1939).
28 *In re* Perlinsky's Estate, 202 Misc. 351, 115 N.Y.S.2d 549 (Surr. Ct. 1952); *accord, In re* Getream's Estate, 200 Misc. 543, 107 N.Y.S.2d 275 (Surr. Ct. 1951).
29 *In re* Well's Estate, 204 Misc. 975, 126 N.Y.S.2d 441, 444-45 (Surr. Ct. 1953).
30 *Id.* at 446.
31 N.Y. SURR. CT. ACT § 231-a-b.